Petition

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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COSMOPOLITAN BROADCASTING CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The Federal Communications Commission, in reviewing the application of Cosmopolitan Broadcasting Corporation for renewal of its license to operate Station WHBI (FM), Newark, New Jersey, determined that the license should not be renewed because Cosmopolitan had failed to exercise adequate supervision over the programming and operations of Station WHBI. This case marks the first denial by the Federal Communications Commission of the renewal of a license of a station which broadcasts, as a substantial portion of its schedule, foreign language and ethnic programs produced and presented by time brokers. Time brokers are persons who pay a fee for the right to present programs during specific time periods and who are permitted to sell commercials within those programs for their own accounts.

The questions presented are:

1. Whether the FCC's conclusions that Cosmopolitan had abdicated control over WHBI's programming and that WHBI's license should not be renewed were the product of reasoned decision making.

2. Whether, on remand, the FCC failed to take the requisite "hard look" at the meritorious nature of WHBI's programming and instead performed a superficial review of the record to rationalize its earlier findings.

LIST OF PARTIES

Parties to the proceeding in the Court of Appeals for the District of Columbia Circuit for which review is requested were Cosmopolitan, the Federal Communications Commission, the American Civil Liberties Union of New Jersey, the Bulgarian American League, the Columbian Lawyers Association, the Congress of Portuguese People, the Croatian National Congress, the Federation of Lithuanian Women's Clubs, the Hungarian Freedom Fighters Federation, the Iran Club, the Japanese American Association of New York, Inc., Unique Radio Group, Inc., the United American Croats, WBLI, Inc., WHCN, Inc. and the Yugoslav Consolidated Benevolent Association.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Cosmopolitan Broadcasting Corporation ("Cosmopolitan") requests that this Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The judgment of the Court of Appeals, which affirmed without opinion the action of the Federal Communications Commission (the "FCC"), appears at Appendix A to this Petition.[1] The previous decision of the Court of

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[1] The appendices are separately bound in a companion volume, which is cited as "Pet. App." In addition, references to "J.A." are to the Joint Appendix in the lower court on second hearing, and references to "J.A.I" are to the Joint Appendix in the lower court on first hearing. Those appendices contain pertinent FCC documents, hearing exhibits, hearing transcript excerpts and pleadings. A copy of those appendices, together with the rest of the record in the lower court, will be lodged with the Clerk of this Court.

Appeals remanding the case to the FCC for further consideration, which is reported at 189 U.S.App.D.C. 139, 581 F.2d 917, appears at Appendix B. The initial decision of the FCC's Administrative Law Judge ("ALJ") in this case denying Cosmopolitan's application for renewal of its license for Station WHBI(FM), Newark, New Jersey, appears at Appendix C. The FCC's decision affirming the ALJ's decision is reported at 59 F.C.C.2d 558 and appears at Appendix D, and its denial of Cosmopolitan's Petition for Reconsideration is reported at 61 F.C.C.2d 257 and appears at Appendix E. The FCC's supplemental decision on remand, which is reported at 75 F.C.C.2d 423, appears at Appendix F. The FCC's decision denying Cosmopolitan's Petition for Reconsideration of the supplemental decision is reported at 79 F.C.C.2d 16 and appears at Appendix G.

JURISDICTION

The judgment of the Court of Appeals, which appears at Appendix A, was entered on June 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

5 U.S.C. § 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE

Cosmopolitan has owned and operated Station WHBI (FM), Newark, New Jersey ("WHBI" or "Station WHBI") since July 1962. In 1964, Cosmopolitan adopted a foreign language/ethnic programming format for the station to provide service to numerous and diverse foreign language and ethnic minorities within WHBI's service area. By 1969 when Cosmopolitan filed the license renewal application at issue in this case, WHBI was providing 114 hours per week, or 68% of WHBI's weekly broadcast schedule, of ethnic programming in English and sixteen foreign languages. Pet. App. B 8. By December 1972, when this case was set for hearing, WHBI was providing ethnic programming in English and twenty-four foreign languages directed to at least twenty-eight distinct ethnic groups. J.A. 256. Virtually all

of WHBI's foreign language and ethnic programming is produced and presented by time brokers.[2]

On February 26, 1969, Cosmopolitan filed the license renewal application at issue in this case. In December 1972, the Commission designated the application for hearing on a number of issues including, inter alia, whether Cosmopolitan had "exercised adequate control and supervision over the programming and operations of WHBI consistent with licensee responsibility." Pet. App. C 40. On Cosmopolitan's motion, the Commission's Review Board added an issue "[t]o determine whether the programming of Station WHBI(FM) has been meritorious, particularly with regard to public service programs." 39 F.C.C.2d 698, 699; J.A. 2.

At the hearing, Cosmopolitan offered evidence that it had in fact maintained control over its programming by carefully selecting time brokers, by specifying basic formats and languages, by scheduling the time-brokered programs and by instructing the brokers, both orally and in writing, as to rules and policies of the station and rules and regulations of the FCC. *See, e.g.*, Pet. App. C 49-54, ¶¶ 17-22. Evidence also described the monitoring system established by Cosmopolitan in the fall of 1967 in response to the FCC's *Public Notice re Foreign Language Programs*, 9 Pike & Fischer Rad. Reg. 2d 1901 (1967) (*"1967 Policy Statement"*), which cautioned licensees to establish and maintain "internal procedures" for the supervision and control of foreign language programs.[3] In sum, that monitoring system provided for the hiring of monitors proficient in each of the languages in which WHBI's programs were presented, for them to monitor

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[2] Time brokers are persons who pay a fee for the right to present programs during specific time periods and who are permitted to sell commercials within those programs for their own accounts.

[3] That notice, however, did not provide specific guidelines as to the type of procedures the FCC would find adequate.

WHBI's programming on a random basis and for them to submit written reports on the programs monitored to the station. *See, e.g.*, Pet App. C 55-59, ¶¶ 29-38 and 40. The system provided for the monthly monitoring of weekly programs and the weekly monitoring of daily programs. *Id.* at ¶ 37. The monitors were given a memorandum containing lay explanations of obscenity, personal attacks and exhortations to break the law and were instructed to report the broadcast of any of those items at once. Pet. App. B 21. In addition, monitors were given written forms to fill out describing each monitored program, together with instructions in completing those forms and in fulfilling their duties as monitors. *Id.* at 21-22.[4]

The evidence presented by Cosmopolitan at the hearing also established that it had kept the FCC informed as to the extent of its foreign language programming and as to its procedures to maintain control over that programming. On October 25, 1967, Cosmopolitan sent the FCC an unsolicited letter regarding the procedures it had established in response to the FCC's *1967 Policy Statement*. *Id.* at 20. Copies of the various forms and instructions utilized in connection with the monitoring system were submitted as attachments to the letter. The FCC never acknowledged or responded to the October 1967 letter. *Id.* at 23. By letter dated February 20, 1968, the FCC requested from Cosmopolitan specific information concerning its internal procedures for complying with the *1967 Policy Statement*. In its response dated April 19, 1968, Cosmopolitan referred to its October 1967 letter and described the current status of the implementation of the monitoring system. Submitted with that letter were copies of the October 1967 letter together with its attachments, a list of the names and addresses

[4] This monitoring system has been used by Cosmopolitan on a continuous basis, with some refinements and improvements, since its adoption in 1967.

of WHBI's monitors, a copy of instructions and procedures distributed to those monitors and copies of all monitoring reports submitted to WHBI since the implementation of the monitoring system in September 1967. The FCC did not respond to the April 1968 letter. *Id.* The FCC never indicated to Cosmopolitan, formally or informally, that the monitoring procedures described in that letter did not meet any of the FCC's requirements.[5]

At the hearing, Cosmopolitan also offered "expert testimony . . . concerning the value of foreign language programming . . . [and] a great deal of evidence concerning the substantive content of WHBI's programming." *Id.* at 30-31. Cosmopolitan also sought to introduce evidence to establish that programming in many of the languages in which WHBI broadcasts was not available on other stations in WHBI's service area and that programming in still other languages was available on other stations only to a very limited extent. However, the ALJ ruled that evidence as to the uniqueness of WHBI's programming was irrelevant to the question of whether WHBI's programming was meritorious and he refused to allow Cosmopolitan to introduce such evidence. *Id.* at 36-37; transcript at 2575-2579.

On July 25, 1974, the ALJ released his Initial Decision. In that decision, the ALJ resolved all but two of the substantive issues against Cosmopolitan and concluded under the meritorious programming issue that Cosmopolitan's programming was not sufficiently meritorious to mitigate the adverse conclusions reached under the other issues. The ALJ therefore determined that renewal of

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[5] Cosmopolitan also supplied information to the FCC as to the nature and extent of its foreign language programming in its license renewal application filed February 28, 1966, which was granted by the FCC on August 5, 1966, J.A.I 97-118, and in its application for modification of WHBI's license to permit the relocation of its main studio, filed October 28, 1968 and granted by the FCC on January 9, 1969, J.A.I 119-34.

WHBI's license would not serve the public interest. Pet. App. C 113, ¶ 35. The Commission unanimously affirmed the ALJ's decision, concluding that Cosmopolitan "had operated its broadcast facility so as virtually to relinquish all interest and control over the station's programming." Pet. App. D 118, ¶ 3.

Cosmopolitan filed a Petition for Reconsideration of the FCC's decision. In denying that Petition, the FCC, in response to the argument that Cosmopolitan had received different treatment than other foreign language broadcasters, asserted that its action was warranted (i) because "the time-brokered foreign language programs involved [in the other cases] represented a relatively miniscule part of total programming, in contrast to the 68% of such programs broadcast by WHBI" and (ii) because "even the *Trans America* case [33 F.C.C.2d 596 (1972)] (the only [comparable case] to go to hearing) did not disclose the overall lack of supervision and other operational deficiencies shown here." Pet. App. E 144, ¶ 12.

Cosmopolitan appealed the Commission's action to the United States Court of Appeals for the District of Columbia Circuit pursuant to 47 U.S.C. § 402(b).[6] On appeal, Cosmopolitan argued that the FCC had erred (i) in concluding that Cosmopolitan had failed to exercise

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[6] That action was also appealed by the Hungarian Freedom Fighters Federation, the Columbian Lawyers Association and the American Civil Liberties Union of New Jersey. In addition, the Bulgarian American League, the Congress of Portuguese People, the Federation of Lithuanian Women's Clubs, the Iran Club, the Japanese American Association of New York, Inc. and the Yugoslav Consolidated Benevolent Association filed briefs as intervenors on appeal. Those appellants and intervenors all argued that the Commission had failed to give due consideration to the importance of WHBI's programming to its ethnic audiences and that the denial of WHBI's license would adversely affect the groups which they represented by depriving such groups of an important source of programming in their native languages. Pet. App. B 36 n.31.

a degree of supervision and control over WHBI's programming and operations consistent with its obligations as a licensee, (ii) in failing to give adequate consideration to the substantial, compelling, and uncontroverted evidence as to the meritorious nature of WHBI's foreign language and ethnic programming, and (iii) in refusing to consider evidence as to the uniqueness of WHBI's programming under the meritorious programming issue.

The Court of Appeals affirmed the FCC's findings that Cosmopolitan had not adequately discharged its responsibility to supervise WHBI's programming and that it had violated certain FCC rules. However, the court held that the FCC had erred in its treatment of the meritorious programming issue in two significant respects. First, the court declared that the FCC had erred by failing to give sufficient consideration to evidence in the record concerning the substantive content, and value, of WHBI's foreign language programming. On this point, the court observed:

> The Commission's sibylline conclusion that Cosmopolitan had failed to demonstrate programming merit "from program logs" entirely ignores this evidence. We thus have no way of knowing whether the Commission even considered this evidence, much less its reasons for finding this evidence insufficient to establish the meritoriousness of WHBI's foreign language programming.

Pet. App. B 34. Second, the court noted that there was a public interest in a diversity of broadcast formats, and it held that the Commission had erred by failing to consider "whether denying Cosmopolitan's application for a license renewal will silence a unique outlet serving 'a specialized audience that would feel its loss.'" *Id.* at 36 (footnote omitted). In this regard, the court held that the ALJ had erred as a matter of law in ruling that evidence as to the availability of foreign language programming on stations other than WHBI was irrelevant under the meritorious programming issue. *Id.* at 37.

Accordingly, the court remanded this case to the FCC with instructions to engage in a more thorough and reasoned consideration of all of the material facts and issues relative to the merit of WHBI's programming service and of the ultimate question whether that service was sufficiently meritorious to warrant renewal of WHBI's license notwithstanding the deficiencies that had been found in other aspects of Cosmopolitan's performance as a licensee.

On December 19, 1979, the FCC adopted a supplemental decision in which it reaffirmed the conclusion reached in its earlier decision that renewal of WHBI's license would not be in the public interest. In the supplemental decision, the FCC stated that it had reassessed the evidence as to the merit and uniqueness of WHBI's programming which Cosmopolitan had presented during the original hearing and that it had found this evidence to be insufficient to establish that WHBI's programming was particularly meritorious. As to the question of whether WHBI's foreign language programming was meritorious by virtue of the fact that it provided a unique service, the FCC concluded that:

> . . . not only was there a diversity of foreign language programming in Cosmopolitan's service area, but . . . the applicant's claim of uniqueness rests on no more than the broadcast of a small number of programs to which a small percentage of WHBI's programming time was devoted.

Pet. App. F 254-55, ¶ 11.[7]

Cosmopolitan petitioned for reconsideration of the FCC's supplemental decision. Cosmopolitan argued, inter alia, that the FCC had ignored uncontroverted evidence

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[7] The FCC admitted into evidence two exhibits offered by Cosmopolitan that had been rejected by the ALJ. The FCC did not allow Cosmopolitan to present additional evidence that WHBI provided a unique service.

in the record as to the amount of WHBI's public service programming, that the FCC's determination that WHBI's programming was not unique was based on conclusory statements not supported by the record and that, in order for the FCC to comply with the mandate of the Court of Appeals, the record had to be reopened to allow the introduction of evidence as to uniqueness. The FCC denied reconsideration on July 18, 1980.

Cosmopolitan appealed the FCC's actions on remand to the Court of Appeals pursuant to 47 U.S.C. § 402(b).[8] On appeal Cosmopolitan argued, inter alia, that the FCC had erred (i) in concluding, contrary to the evidence of record, that Cosmopolitan's foreign language programming was not meritorious and (ii) in refusing to reopen the record to receive further evidence as to the uniqueness of WHBI's programming. In a *per curiam* decision, the Court of Appeals found that the FCC had "faithfully complied with [its] instructions on remand" and affirmed the FCC's actions. Pet. App. A 3.

REASONS FOR GRANTING THE WRIT

This case warrants review in this Court because to leave undisturbed the FCC's decision would be to sanction an agency's arbitrary and capricious action that will deprive numerous and diverse ethnic and foreign language communities of a unique voice directed to the needs and interests of those communities.[9] Time-brokered

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[8] Those actions were also appealed by the Bulgarian American League, the Columbian Lawyers Association, the Congress of Portuguese People, the Federation of Lithuanian Women's Clubs, the Japanese American Association of New York, Inc., the Yugoslav Consolidated Benevolent Association and Unique Radio Group, Inc. In addition, WHCN, Inc. and WBLI, Inc. intervened in the appeal.

[9] That numerous ethnic language groups filed as intervenors in the lower court evidences the concern of the ethnic and foreign language communities at the loss of the outlet provided by WHBI. The Iran Club, the Bulgarian American League, the Yugoslav

ethnic and foreign language programs fulfill an important role in ethnic and foreign language communities, serving to assuage homesickness, maintain separate cultures and unify ethnic communities around significant social and political causes.[10] The American Folklife Center, which was established by Congress to work with the Library of Congress to preserve and present American Folklife, has determined that "time brokerage is necessary for the survival of ethnic radio because small ethnic communities cannot support even part-time outlets."[11] The FCC's decision, which fails to set out specific guidelines, as well as specific failings of Cosmopolitan, with respect to the supervision of foreign language programming produced and presented by time brokers, if left undisturbed, will have a "chilling effect" on the broadcast by other licensees of time brokered programs directed to foreign language and ethnic communities.[12] Thus, condoning the FCC's failure to articulate a clear standard

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Consolidated Benevolent Association, the Congress of Portuguese People, the Japanese American Association of New York, the Federation of Lithuanian Women's Clubs, the Hungarian Freedom Fighters Association and the Columbian Lawyers Association strenuously argued the value of WHBI's programming to their respective ethnic communities. Pet. App. B 36 n.31.

[10] The FCC itself has recently recognized the importance of ethnic and foreign language broadcasting. *Part-Time Programming*, 82 F.C.C.2d 107 (1980).

[11] Comments of American Folklife Center of the Library of Congress in BC Docket No. 78-355, at 1-2.

[12] See Reply Comments of the Radio Foundation, Inc. in BC Docket No. 78-355, at 14; Comments of Universal Broadcasting Corporation in BC Docket No. 78-355, at 2-3. The FCC's decision in that docket, *Part-Time Programming*, 82 F.C.C.2d 107 (1980), is not to the contrary. The FCC's statement encouraging part-time programming does not offset the ambiguity in the applicability of standards and in the imposition of penalties as evidenced by its action in this case.

and allowing it to invoke a severe sanction, nonrenewal of license, without clearly explaining its reasons for imposing this sanction will have a real, immediate and harmful effect on foreign language and ethnic communities throughout the United States. The FCC's arbitrary and capricious actions in this case must not, therefore, go uncorrected. Consequently, this Court should grant the writ to redress the FCC's abandonment of established standards for administrative action.

I. The FCC's Conclusions That Cosmopolitan Had Abdicated Control Over WHBI's Programming And That WHBI's License Should Not Be Renewed Were Not The Product of Reasoned Decision Making And Thus The FCC's Action Was Arbitrary And Capricious.

The FCC's determination that Cosmoplitan's license for WHBI should not be renewed was based entirely upon its conclusion that Cosmopolitan failed to exercise a degree of supervision and control over WHBI's programming and operations consistent with its obligations as a licensee. Yet in no opinion issued in this case does the FCC explain how Cosmopolitan's actions varied from policies promulgated by the FCC; why, given the FCC's tacit approval of Cosmopolitan's operating procedures, those procedures were found to be deficient; or why Cosmopolitan was singled out for severe treatment. Although an agency is not estopped from changing its policies and their application, *Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944), it may not do so without articulating "with reasonable clarity its reasons for decision, and [identifying] the significance of the crucial facts." *Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 393, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923 (1971); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). The FCC's decision in this case is not merely cryptic. It is conclusory and devoid of reasoning.

First, as the FCC itself acknowledged, the adequacy of Cosmopolitan's procedures for supervising WHBI's substantial foreign language and ethnic programming, comprising 68% of its weekly schedule, and its operations with respect thereto, must be judged in accordance with the FCC's policies regarding the broadcast of foreign language programs produced by time brokers. Those policies are set forth in the Commission's 1967 *Public Notice re Foreign Language Programs* (*"1967 Policy Statement"*), 9 Pike & Fisher Rad. Reg. 2d 1901, and are discussed in greater detail in the FCC's 1973 *Memorandum Opinion and Order re License Responsibility to Exercise Adequate Control Over Foreign Language Programs* (*"1973 Policy Statement"*), 39 F.C.C.2d 1037.[13] Neither the ALJ nor the FCC have explained in what respects Cosmopolitan's procedures for supervising and controlling WHBI's operations, as summarized in the findings, did not meet the standards outlined in those policy statements. The FCC does allege two defects—(i) that WHBI's monitors "did not evaluate substantive program content" and (ii) that Cosmopolitan "did not instruct prospective monitors in formal Commission requirements [but opted] instead for a 'Memorandum,' in

[13] The *1973 Policy Statement* was adopted shortly after this case was designated for hearing because the FCC recognized that licensees were confused as to their responsibilities with respect to foreign language programming and as to the meaning of the one-page *1967 Policy Statement*. 39 F.C.C.2d at 1039, ¶ 7. Cosmopolitan argued before the FCC that it should be judged by the procedures developed in response to the *1967 Policy Statement* and should be commended rather than condemned for its conscientious efforts to establish specific compliance procedures in what the FCC recognized as an area of confusion. Cosmopolitan also argued that, if judged strictly under the standards of the *1973 Policy Statement*, it should be afforded an opportunity to present evidence as to changes made in its procedures subsequent to the release of that statement. The FCC rejected those arguments, Pet. App. E 138-39, ¶ 6 n.3, treating the *1967 Policy Statement* as if it spelled out the FCC's requirements in this area with precision and clarity.

English, containing a simplified summary of 'objectionable material' which should be reported to the station." Pet. App. D 121, ¶ 7. However, neither of these points alleges any inconsistency with the *1967* and *1973 Policy Statements*. The first point is not well taken, because the *Policy Statements* were issued, not to suggest a means to determine program content, but to insure that foreign language broadcasts were presented in accordance with the FCC's rules and policies. That Cosmopolitan's procedures effectively insured that compliance is clearly evidenced by the FCC's inability, after extensive investigation, to cite any such violation in WHBI's foreign language broadcasts. The second point attempts to draw a distinction between Cosmopolitan's lay instructions to monitors and the *1973 Policy Statement*'s requirement that the "outside monitor [be] made familiar with . . . the Commission's requirements" yet does not explain why lay instruction is insufficient, especially in view of the fact that no violations of the FCC's rules were alleged as to WHBI's foreign language programming. Rather than analyzing the evidence of record in light of the *1967* and *1973 Policy Statements*, the FCC quotes, in various forms, FCC pronouncements regarding the obligation of licensees to retain control over programming content at all times and makes isolated references to some of Cosmopolitan's procedures and conclusory statements to the effect that WHBI was not operated in accordance with the FCC's requirements.[14] And, as noted

[14] Further, the *1973 Policy Statement* stated that there was no rigid formula for licensees to follow in discharging their supervisory responsibilities with respect to time-brokered foreign language broadcasts and indicated that "absent substantial extrinsic evidence of intentional abuse, our only legitimate concern can be whether the procedures followed allow a broadcaster to maintain sufficient control over his programming," 39 F.C.C.2d at 1041, ¶ 14, *quoting Wolfe Broadcasting Corp.*, 32 F.C.C.2d 761, 763 (1979). The FCC has never suggested that the evidence of record is indicative of any "intentional abuse" by Cosmopolitan.

by the lower court, the decisions of both the ALJ and the FCC lack any citation to the record to indicate what facts, if any, support those conclusions. The FCC's assertion that its conclusions as to the control issue rest "on the findings and conclusions [of the ALJ]" and "on the *totality* of the licensee's *modus operandi*," Pet. App. E 138, ¶ 5, does not substitute for the articulation, with reasonable clarity, of the reasons for its decision or the identification and significance of crucial facts. *Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 393, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923 (1971).

Similarly, the FCC has yet to explain why, in 1972, it was suddenly shocked by operating procedures that had been fully disclosed to it by the licensee several years before. This disclosure included a response to the FCC's inquiry into Cosmopolitan's operations initiated by letter dated February 20, 1968. That letter requested that Cosmopolitan submit "a statement specifying in detail how you familiarize yourself with and maintain control over your foreign language programming" and to "submit copies of all reports made by outside monitors from March 1967 to the present, together with the names and addresses of all monitors used by WHBI." [15] Cosmopolitan's response included a full description of its monitoring system and attached were monitoring forms and reports and the names and addresses of its monitors. The FCC never responded. Further, the FCC never indicated to Cosmopolitan that the described procedures were in derogation of the FCC's rules or its *1967* and *1973 Policy Statements*. This and other correspondence establish a course of tacit approval by the FCC of Cosmopolitan's procedures that the FCC now seeks to disavow. Although

[15] That letter was sent some four months after Cosmopolitan voluntarily filed with the FCC a description of the procedures it had implemented in response to the *1967 Policy Statement*. Cosmopolitan's filing was never acknowledged by the FCC.

the FCC is not estopped from establishing a new policy and applying it to the renewal of an old license, *Churchill Tabernacle v. FCC*, 81 U.S.App.D.C. 411, 160 F.2d 244 (1947), it may not do so without stating clearly its reasons for the change. *Cf. Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 393, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923 (1971). To allow otherwise would permit an agency to operate without standards and, as the FCC has done here, to develop and apply ad hoc standards in an arbitrary and capricious manner. *See* 5 U.S.C. § 706(2)(A).

Nor has the FCC adequately explained the imposition of what it terms a "severe sanction," *Continental Broadcasting, Inc.*, 15 F.C.C.2d 120, 131 (1968), *aff'd*, 142 U.S. App.D.C. 70, 439 F.2d 580, *cert. denied*, 403 U.S. 905 (1971), in this case when other licensees who were found guilty of derelictions similar to those with which Cosmopolitan is charged have received lesser sanctions. Although an agency's choice of sanction is "not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases," *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 187 (1973), *FCC v. WOKO, Inc.*, 329 U.S. 223, 228 (1946), it is nevertheless clear that when an agency alters or adapts its regulatory approach with the result that "similar supplicants receive dissimilar dispensations," the agency must provide "adequate explication of the reasons why such alteration or adaptation may be seen to be rational and to escape the domain of the seemingly arbitrary." *FTC v. Crowther*, 139 U.S.App.D.C. 137, 141, 430 F.2d 510, 514 (1970); *accord, White Mountain Broadcasting Co. v. FCC*, 194 U.S.App.D.C. 355, 598 F.2d 274, *cert. denied*, 444 U.S. 963 (1979); *Distrigas of Massachusetts Corp. v. FPC*, 517 F.2d 761 (1st Cir. 1975); *Melody Music, Inc. v. FCC*, 120 U.S.App.D.C. 241, 345 F.2d 730 (1965). Further, that explication must "do more than enumerate factual differences, . . . it must explain the relevance of

those differences to the purposes of the Federal Communications Act." *Melody Music, Inc. v. FCC*, 120 U.S.App. D.C. 241, 244, 345 F.2d 730, 733 (1965); *see also, e.g., White Mountain Broadcasting Co. v. FCC*, 194 U.S.App. D.C. 355, 598 F.2d 274, *cert. denied*, 444 U.S. 963 (1979).

The FCC has submited two bases for the distinction in treatment between Cosmopolitan and the licensees in other cases involving the supervision of time-brokered foreign language programs. *See, e.g., Drexel Hill Associates, Inc.*, 34 Pike & Fischer Rad. Reg. 2d 1534 (1975); *Sierra Madre Broadcasting Co.*, 47 F.C.C.2d 424 (1974); *Birch Bay Broadcasting Co.*, 36 F.C.C.2d 500 (1972); *Trans America Broadcasting Corp.*, 33 F.C.C.2d 596 (1972); *Public Notice re Station WRIB* (Report No. 6975, Jan. 25, 1968). The first distinction, that the amount of time-brokered foreign language programming broadcast by WHBI was substantially more than that broadcast by other licensees, can be dismissed as a factual distinction which is not relevant to the purposes of the Communications Act. The FCC has not established that a quantitative distinction is relevant to that Act, nor is time-brokering *per se* contrary to the Act's purposes.[16] The FCC's second distinction, that other cases "did not disclose the overall lack of supervision and other operational deficiencies shown here," fails to explain why other licensees who had failed to utilize *any* supervisory procedures whatsoever with regard to time-brokered programming were allowed to retain their licenses, *see Drexel Hill Associates, Inc.*, 34 Pike & Fisher Rad. Reg. 2d 1534 (1975), *Sierra Madre Broadcasting Co.*, 47 F.C.C.2d 424 (1974), *Birch Bay Broadcasting Co.*, 36 F.C.C.2d 500 (1972), *Trans America Broadcasting Corp.*, 33 F.C.C.2d 596 (1972), while Cosmopolitan, a licensee

[16] In fact, the FCC now encourages the presentation of programming produced by time brokers. *See Part-Time Programming*, 82 F.C.C.2d 107 (1980).

which had conscientiously adopted supervisory procedures and had disclosed those procedures to the FCC, had its license renewal denied.

The FCC's failure to explain its decision other than in terms of conclusory statements and non sequiturs, as well as its failure to cite to the record, are clear "danger signals" indicating that the FCC has not "really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." *Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 393, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923 (1971) (footnote omitted). The lower court chastised the FCC for failure to cite to the record and indicated, as to one matter, that it could not determine what evidence the FCC and the ALJ relied on in reaching their factual conclusions. Pet. App. B 27 n.22 and 27-28.[17] Despite these derelictions, the lower court let stand the FCC's determinations on the control issue, deferring to the FCC's expertise and experience.[18] Such deference is no substitute for an adequate evidentiary basis upon which agency findings must rest. *Memphis Light, Gas & Water Division v. FPC*, 164 U.S.App.D.C. 156, 165, 504 F.2d 225, 234 (1974). The lower court has, in ignoring the danger signals, allowed deference "to slip into a judicial inertia." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965); *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 272 (1968); *Greater Boston Television Corp.*, 143 U.S.App.D.C. 383, 392, 444 F.2d 841, 850 (1970), *cert. denied*, 403 U.S. 923 (1971). To leave uncorrected the FCC's decision, which

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[17] Cosmopolitan filed 104 exceptions to the ALJ's decision, replete with citations to the record. The FCC denied all but four of them. Pet. App. D 128-34; Pet. App. E 138, ¶ 5 n.2, and 141, ¶ 8.

[18] The lower court correctly found the FCC's decision to be insufficient with respect to the meritorious programming issues because it could not be assured that the FCC had given "reasoned consideration to all material facts and issues." Pet. App. B 34.

silences a unique outlet for the broadcast of ethnic and foreign language programming without the FCC's having provided a clear basis for that decision, undermines the integrity of the administrative process. The FCC's action cannot be characterized as reasoned decision making.

II. On Remand, The FCC Failed To Take The Requisite "Hard Look" At The Meritorious Nature of WHBI's Programming And Instead Merely Performed A Superficial Review Of The Record To Rationalize Its Earlier Findings.

The FCC's failure to address fully the issues involved in this case is particularly evident in its consideration of the meritorious programming issue on remand. That issue was designated by the FCC at Cosmopolitan's request to determine if WHBI's past programming was sufficiently meritorious so as to mitigate the significance of any adverse findings under the control issue. Pet. App. B 28; *cf. Medford Broadcasters, Inc.*, 18 F.C.C.2d 817, 818 (1969). On first hearing the lower court correctly determined that the FCC had not, with respect to the meritorious programming question, given "reasoned consideration to all material facts and issues" and remanded the case for further consideration. The lower court called for special consideration by the FCC of the uniqueness of WHBI's programming and of the "great deal of evidence concerning the substantive content of WHBI's programming" from sources other than program logs.

On remand, the FCC failed to comply with the court's mandate and again concluded that WHBI's programming was not meritorious. Without reopening the record, the FCC issued a supplemental decision that was nothing more than a post hoc rationalization of its earlier decision based upon selected evidence of record and conclusory speculation. This type of glossing over the record cannot be relied upon to justify an otherwise vulnerable decision. *See Local 814, International Brotherhood of*

Teamsters v. NLRB, 167 U.S.App.D.C. 387, 395, 512 F.2d 564, 572 (1975) (Bazelon, C.J., concurring in part and dissenting in part), *citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974); *NLRB v. Food Store Employees Local 347*, 417 U.S. 1, 9-10 (1974).

Specifically, the FCC ignored substantial, uncontroverted evidence of record establishing the merit of WHBI's public service programming. The FCC, in clear contradiction of the lower court's mandate, has in essence continued to place primary, if not total, emphasis on log evidence. The FCC has persisted in its view that the absence of substantiating log evidence "was and remains a serious deficiency in Cosmopolitan's showing," Pet. App. F 150, ¶ 6, concomitantly dismissing all non-log evidence on tenuous grounds. The FCC attempted to justify its failure to look at certain evidence because Cosmopolitan's reliance on that evidence was belated. However, it is not the FCC's task to gauge the measure of reliance on certain evidence, it is instead charged with issuing a decision supported by substantial evidence based on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951); *Greater Boston Television Corp,*. 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971); 5 U.S.C. § 706(2)(E). That the FCC did not consider the whole record on remand is also evidenced by its having supported its proposition that the oral testimony of producers with regard to public service programming was vague by citation to pages in the transcript on which quite specific information is offered. *See* J.A. 215, 223, 230, 238, 240, 243.

In considering the uniqueness of WHBI's programming, the FCC similarly gave short shrift to the evidence of record. The FCC ignored specific evidence that WHBI was the sole outlet for programming in eleven lan-

guages. Further, the FCC based its decision on factual assumptions—that ample foreign language programming was presented by other stations in WHBI's service area and that WHBI's audience for its unique languages was very small—for which there is no basis in the record. Similarly, the FCC assumed without explanation that the needs of all groups speaking the same language are co-extensive, despite substantial evidence in the record that different cultural, ethnic and dialectal subgroups have very different needs. Even more cryptically, the FCC offered its opinion that WHBI's unique programming is expendable because the time brokers producing that programming can offer it to other stations in the area. There is nothing in the record to provide a factual basis for that speculation. Clearly, sheer guess-work cannot substitute for reasoned decision making: "[T]he public interest rubric encourages judicial deference to an agency's expertise, not to its prescience." *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1045 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

The lower court, in remanding this case, found that the ALJ's refusal to accept evidence of uniqueness was incorrect as a matter of law. Accordingly, Cosmopolitan requested that the FCC reopen the record to allow the presentation of that evidence. The FCC, despite the lower court's mandate and its own characterization of the record as meager, inaccurate and unreliable, denied the request on the grounds that the ALJ's ruling had come late in the hearing. Yet that ruling came at the critical point when Cosmopolitan sought to introduce evidence as to the unique nature of WHBI's programming. On review of an application for renewal of a broadcast license, the FCC has an "affirmative duty to assist in the development of a meaningful record which can serve as a basis for the evaluation of the licensee's performance of his duty to serve the public interest." *Office of*

Communications of United Church of Christ v. FCC, 138 U.S.App.D.C. 112, 117, 425 F.2d 543, 548 (1969); *cf. Citizens TV Protest Committee v. FCC*, 121 U.S.App. D.C. 50, 56, 348 F.2d 56, 62 (1965). The FCC has failed, not only in meeting that affirmative duty, but also in complying with the lower court's directive on remand.[19]

In the instant case, the FCC "seems to have assumed the defense of its grant, rather than the public interest, as its primary role in the proceedings." *Clarksburg Publishing Co. v. FCC*, 96 U.S.App.D.C. 211, 215, 225 F.2d 511, 515 (1955); *see Citizens TV Protest Committee v. FCC*, 121 U.S.App.D.C. 50, 56, 348 F.2d 56, 62 (1965). Rather than giving reasoned consideration to all the record evidence regarding the public service programming broadcast by WHBI and regarding the uniqueness of WHBI's foreign language programming, the FCC approached the record with a view to justifying its prior decision that WHBI's programming lacked merit. It has failed to give the evidence the "hard look" required. Further, upon finding that the evidence on uniqueness was deficient, it nonetheless reached a decision based upon what it termed an inadequate record, despite the fact that its own rulings had caused those inadequacies. This process of rationalization, left undisturbed by the lower court, cannot be allowed to substitute for reasoned decision making. Accordingly, this Court should invoke its power of supervision to correct the FCC's abuse of its discretion and its abuse of the administrative process.

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[19] The lower court's determination that the FCC had complied with its instructions on remand is not decisive. A lower court's interpretation of its own mandate does not bind this Court. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940).

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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September 25, 1981

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Appendix

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81-601

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COSMOPOLITAN BROADCASTING CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

September Term, 1980

FCC No. 79-874 (1/7/80)

No. 80-1902

COSMOPOLITAN BROADCASTING CORPORATION,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

WHCN, INC. and WBLI, INC.,
Intervenors

FCC No. 80-393 (7/18/80)

No. 80-1903

COSMOPOLITAN BROADCASTING CORPORATION,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

WHCN, INC. and WBLI, INC.,
Intervenors

FCC No. 80-393 (7/18/80)

No. 80-1967

BULGARIAN AMERICAN LEAGUE,
COLUMBIAN LAWYERS ASSOCIATION,
CONGRESS OF PORTUGESE PEOPLE,
FEDERATION OF LITHUANIAN WOMEN'S CLUBS,
JAPANESE AMERICAN ASSOCIATION OF NEW YORK, INC.,
and YUGOSLAV CONSOLIDATED BENEVOLENT ASSOCIATION,
Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

WHCN, INC. and WBLI, INC.,
Intervenors

FCC No. 80-393 (7/18/80)

No. 80-1968

UNIQUE RADIO GROUP, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

WHCN, INC. and WBLI, INC.,
Intervenors

Appeals from Orders of the
Federal Communications Commission

Filed Jun. 29, 1981

Before: WRIGHT and ROBB, Circuit Judges, and MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals.

JUDGMENT

These causes came on to be heard on the record on appeal from the Federal Communications Commission and were briefed and argued by counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. *See* Local Rule 13(c).

In *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917 (D.C. Cir. 1978), this court held that the Federal Communications Commission was justified in concluding that the company had failed to retain responsibility for programming, had failed to retain familiarity with programming, and had committed other violations of FCC regulations evidencing an underlying abdication of licensee responsibility. We further held that where there is a likelihood that a license may not be renewed, determination of the meritoriousness of programming must include consideration of the uniqueness of that programming to a significant segment of the public. We remanded the case with instructions to the Commission to give due regard to this consideration.

We now hold that the Commission has faithfully complied with our instructions on remand. We further hold that the Commission's decision to deny Cosmopolitan's petition for distress sale relief was consistent with its prior decisions and was supported by a reasoned explanation. *See Stereo Broadcasters, Inc. v. FCC*, —— F.2d —— (D.C. Cir. No. 79-2412, decided April 22, 1981).

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* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the orders of the Federal Communications Commission appealed from in these causes are hereby affirmed.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2019

COSMOPOLITAN BROADCASTING CORPORATION

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY,
Appellant

No. 76-2020

COSMOPOLITAN BROADCASTING CORPORATION,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

THE CROATIAN NATIONAL CONGRESS, ET AL.
BULGARIAN AMERICAN LEAGUE
JAPANESE AMERICAN ASSN. OF NEW YORK, INC.
FEDERATION OF LITHUANIAN WOMEN'S CLUBS
CONGRESS OF PORTUGESE PEOPLE
YUGOSLAV CONSOLIDATED BENEVOLENT ASSN.
IRAN CLUB,
Intervenors

No. 76-2033

COLUMBIAN LAWYERS ASSOCIATION,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

No. 76-2034

HUNGARIAN FREEDOM FIGHTERS FEDERATION,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

Appeals from an Order of the
Federal Communications Commission

Argued December 7, 1977

Decided May 31, 1978

Harry M. Plotkin, with whom, *Thomas Schattenfield*, and *David Tillotson* were on the brief for appellant Cosmopolitan Broadcasting Corporation case No. 76-2020.

Jeremiah S. Gutman for appellant, American Civil Liberties Union of New Jersey case No. 76-2019.

Anthony S. Caronna was on the brief for appellant Columbian Lawyers Association case No. 76-2033.

Andras H. Pogany was on the brief for appellant Hungarian Freedom Fighters Federation case No. 76-2034.

Gregory M. Christopher, Attorney, Federal Communications Commission case No. 76-2019, 76-2020, 76-2033 and 76-2034. *Werner K. Hartenberger*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel. *J. Tullos Wells*, and *James H. Kizziar, Jr.*, Counsel, Federal Communications Commission, were on the brief, for appellee.

Valdas Guoba was on the brief for Intervenor, Federation of Lithuanian Women's Clubs, case No. 76-2020.

Gerald Eisenberg was on the brief for Intervenor, Iran Club, case No. 76-2020.

Jack Chadrjian was on the brief for Intervenor, Bulgarian American League, case No. 76-2020.

George Yamaoka was on the brief for Intervenor The Japanese American Association of New York, Inc., case No. 76-2020.

Charles A. Giulini was on the brief for Intervenor Yugoslav Consolidated Benevolent Association, case No. 76-2020.

Dr. Branko M. Peselj also entered an appearance for Intervenor The Croatian National Congress, et al., case No. 76-2020.

Before: BAZELON, LEVENTHAL and ROBINSON, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* BAZELON.

Concurring opinion filed by *Circuit Judge* LEVENTHAL.

BAZELON, *Circuit Judge*: Citing numerous technical violations and a virtual abandonment of licensee responsibility, the Federal Communications Commission (FCC) denied the 1969 application of Cosmopolitan Broadcasting

Corporation for a renewal of its licenses to operate station WHBI (FM). Cosmopolitan appeals, arguing that the Commission's decision was arbitrary and capricious and not the product of the "reasoned decision making" required by *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1025-26 (D.C.Cir. 1971).

I. Background

Cosmopolitan has owned and operated station WHBI since it began broadcasting in 1962. Donald J. Lewis is the controlling stockholder of Cosmopolitan. He is the president, treasurer and director of the corporation, and effectively controls all the activities of WHBI. WHBI is licensed to serve Newark, New Jersey. Lewis had originally intended to develop WHBI as a black-oriented station. When this effort proved commercially unsuccessful, he moved WHBI into the field of foreign language and ethnic specialty programming. By 1969, 114 hours per week or 68% of WHBI's schedule [1] was devoted to ethnic programming broadcast in some 18 foreign languages.[2]

Virtually all of WHBI's ethnic programming, and a significant portion of its English language programming,

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[1] WHBI broadcasts continuously, 168 hours per week.

[2] The following is a breakdown of WHBI's weekly foreign language programming in 1969: Spanish (45.5 hours); Italian (35.5 hours); Greek (10 hours); Hungarian (4 hours); Arabic (2.5 hours); Polish (2.75 hours); Brazilian (2.05 hours); Portuguese (2 hours); Lithuanian (1 hour); Slovakian (55 minutes); Croatian (.5 hours); Albanian (.5 hours); Ukranian (.5 hours); Roumanian (.5 hours); Armenian (.5 hours); Yugoslavian (.5 hours); Bulgarian (.5 hours); Norwegian (.5 hours). Reply brief for appellant, Appendix A at Exhibit #6. By 1972, WHBI also broadcast in Korean, Macedonian, Urdu, Hindi, Bengali, Japanese, and Russian. WHBI, Exhibit #6, Supplemental Joint Appendix (S.J.A.) at 31-58.

is produced and presented by time brokers who pay Cosmopolitan a flat fee for the right to present programs on WHBI in specific time periods. The time brokers may sell commercials within these time periods for their own account, or they may re-sell the time to sub-brokers. Over 75% of WHBI's air time is sold to time brokers; approximately 20% of the remaining time is sold or given to persons or groups for religious broadcasts, with about 2 minutes per hour reserved by WHBI for station breaks and used mainly for public service announcements and commercial messages.

On February 26, 1969, Cosmopolitan applied for a renewal of its license to operate WHBI. The FCC, concerned with Cosmopolitan's control of its programming, deferred action on its application until further investigation. On December 19, 1972, the Commission issued a Notice of Apparent Liability designating Cosmopolitan's application for a hearing pursuant to section 309(e) of the Communications Act of 1934, 47 U.S.C. § 309(e). There were numerous issues presented, the most important being whether Cosmopolitan had "exercised adequate control and supervision over the programming and other operation of Station WHBI consistent with licensee responsibility."[3] Joint Appendix (J.A.) at 2. Upon the

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[3] Other issues designated for a hearing were:

(a) To determine whether the applicant broadcast deceptive or misleading advertising.

(b) To determine whether the licensee permitted a time broker to use the licensed facility in furtherance of a scheme to obtain monies from persons who were misled to believe they were being offered employment when, in fact, the purpose was to obtain purchases of a time broker's service, facilities, air time or course of instruction and training.

(c) To determine whether the applicant failed timely to file with the Commission contracts relating to the resale of

motion of Cosmopolitan, an issue was added by the Commission's Review Board "to determine whether the programming of Station WHBI(FM) has been meritorious,

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broadcast time in violation of Section 1.613(c) of the Commission's Rules.

(d) To determine whether the applicant failed to make entries in the program logs of WHBI properly identifying the political affiliation of certain candidates for public office in violation of Section 73.282 of the Commission's Rules.

(e) To determine whether applicant failed to maintain certain records and make them available for public inspection as required by Section 73.289(f) and 73.290(d) of the Commission's Rules.

(f) To determine whether the rates charged for announcements broadcast by WHBI on behalf of candidates for political office exceeded that charged for announcements broadcast by WHBI for other candidates and other commercial advertisers and, if so, whether this practice violates the fairness doctrine or by engaging in that practice the licensee is otherwise not serving the public interest by discouraging candidates for political office from using the licensed facility.

(g) To determine whether applicant failed to make proper entries in the program logs of WHBI containing information pertaining to foreign language programs in violation of Section 73.281(a) of the Commission's Rules.

(h) To determine whether applicant has broadcast detailed pre-race information prior to horse racing events and, if so, whether such broadcasts were intended to be of aid to illegal gambling or might reasonably have been expected to be of such aid.

(i) To determine whether applicant broadcast information sponsored by publishers of "scratch-sheets" or other publications disseminating detailed horse racing information by touts or other persons whose activities may result in aiding illegal gambling or furnishing information to illegal gamblers or bookmakers; and if other information

particularly with regard to public service programs." 39 FCC 2d 698, 699 (1973).[4]

After a hearing before an Administrative Law Judge (ALJ) an initial decision was released on July 25, 1974. *Cosmopolitan Broadcasting Corp.*, FCC 74D-41, J.A. at

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was broadcast which may have resulted in aiding illegal gambling on events other than horse races.

(j) To determine whether applicant broadcast an advertisement or information concerning a lottery in violation of Title 18 U.S.C. Section 1304 (1964).

(k) To determine whether applicant failed timely to file ownership reports to the Commission in violation of [Section] 1.615 of the Commission's Rules.

(l) To determine whether the license has substantially carried out its representations in its application for renewal in regard to the presentation of news by station WHBI.

(m) To determine whether in the light of the evidence adduced under the foregoing issues, the licensee possesses the requisite qualifications to remain a licensee of the Commission.

(n) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the captioned application would serve the public interest, convenience and necessity.

S.J.A. at 2-4. The Commission also raised the issue of whether, in the event the hearing record did not warrant denial of Cosmopolitan's renewal application, a forfeiture of $10,000 or some lesser amount should be assessed against Cosmopolitan for broadcasts of lottery information which occurred within one year of the issuance of the Bill of Particulars served on Cosmopolitan pursuant to the Notice of Apparent Liability. *See* 18 U.S.C. § 1304.

[4] Cosmopolitan had requested that a determination be made as to whether Cosmopolitan's programming was meritorious "particularly with regard to programs designed to serve the needs and tastes of ethnic minorities within the station's service area."

2-57. The ALJ resolved almost all of the substantive issues against Cosmopolitan.[5] He also refused to find "that the programming of station WHBI(FM) was particularly meritorious." J.A. at 54. The ALJ held that the granting of Cosmopolitan's application for renewal of its license for WHBI(FM) "would not serve the public interest, convenience and necessity." *Id.* at 56. *See* 47 U.S.C. § 309(a). The Commission unanimously affirmed the ALJ's decision, 59 FCC 2d 558 (1976), concluding that Cosmopolitan "had operated its broadcast facility so as virtually to relinquish all interest and control over the station's programming to time brokers, religious broadcasters and commission salesmen." *Id.* at 560. In the FCC's view, the many violations found by the ALJ were a direct result of Cosmopolitan's abdication of licensee responsibility. *Id.* WHBI's programming did not "warrant any finding of special merit" because Cosmopolitan was not able to substantiate meritorious programming "from program logs submitted in evidence." *Id.* at 564.

Cosmopolitan filed a Petition for Reconsideration of the FCC's decision. In a Memorandum Opinion and Order released on Oct. 14, 1976, the Commission reaffirmed its earlier decision. 61 FCC 2d 257 (1976). Cosmopolitan appeals pursuant to 47 U.S.C. § 402(b).

II. Licensee Responsibility for Programming and Operations

At the heart of this case is the "longstanding bulwark of Commission policy" that "licensees have an affirmative, non-delegable duty to choose independently all programming for broadcast, in light of the tastes and ascertained needs and problems of the community." *Network Broadcasting by Standard (AM) and FM Broadcast Stations*,

[5] Cosmopolitan was found innocent of the infractions listed in issues "(h)" and "(i)." *See* note 3 *supra*.

63 FCC 2d 674, 690 (1977). In the Commission's view, Cosmopolitan has abdicated this duty by operating WHBI "primarily as a clearinghouse for the sale of program time for use or resale by others." Brief for appellee at 20.

The Commission contends that Cosmopolitan manifested its abdication of its duty in three ways. First, Cosmopolitan relinquished its non-delegable programming responsibility to time brokers and other purchasers of air time. Second, Cosmopolitan failed to maintain effective supervisory procedures to ensure familiarity with the content of WHBI's foreign language programming. Third, as a result of its abdication of control, Cosmopolitan permitted a significant number of violations of Commission rules to occur. Brief for appellee at 19-20.

A. *Failure to Retain Responsibility for Programming*

A basic premise of Commission policy is that a licensee is a "trustee" for the public, and that he must therefore assume the "primary duty and privilege to select the material to be broadcast to his audience . . . ." *1960 Commission En Banc Programming Inquiry*, 44 FCC 2303, 2311-12 (1960). *See Yale Broadcasting Co. v. FCC*, 478 F.2d 549, 599-600 (D.C.Cir.), *cert. denied*, 414 U.S. 914 (1973). "The Commission has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee." *WCHS-AM-TV Corp.*, 8 FCC 2d 608, 609 (1967). The Commission has thus expressed strong disapproval of licensees who have relinquished control over portions of their programming through contractual arrangements, *Carol Music, Inc.*, 37 FCC 379, 380, 400 (1964), through excessive "plugging" into national network programming, *Allen T. Simmons*, 11 FCC 1160, 1173 (1947), *aff'd*, 169 F.2d 670 (D.C. Cir.), *cert. denied*, 335 U.S. 846 (1948),[6] or, most per-

[6] In *Simmons* the FCC rejected an application for a power increase and for a change in a station's frequency by a licensee who

tinently for appellant, through excessive time brokerage. *Metropolitan Broadcasting Corp.*, 8 FCC 557, 561-64, 570 (1941).

The Commission has defined a time broker as

> one who buys time and then resells it to others. The time is the broker's to do with as he wishes and the risk is entirely the broker's since, if he cannot resell the time, he is still responsible for payment to the station of the agreed sum. Normally the broker has the entire responsibility for collection of money from the advertisers to whom he sells.

United Broadcasting Co. of New York, 4 RR 2d 167, 173 (1965). By engaging the services of time brokers a licensee may abdicate his own non-delegable duty to control the programming content of his station. For this reason the FCC has stated flatly that "any extensive time brokering . . . may be contrary to the public interest," *In the Matter of Clarifying Paragraph (c) of Section 1.613*, 33 FCC 2d 653 (1972), and by regulation it has maintained a close scrutiny on time brokerage contracts.[7] *See Inquiry into Subscription Agreements Be-*

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proposed merely to "plug" into the CBS network line during the hours of 8 a.m. to 11 p.m. The Commission stated that the "applicant's proposed program policy is . . . tantamount to a voluntary abdication to the network of the duty and responsibility of a broadcast station licensee to determine for itself the nature and character of a program service which will best meet the needs of listeners in its area . . . ." 11 FCC at 1173.

[7] During the period covered by Cosmopolitan's application for a license renewal, FCC regulations required licensees to file with the Commission "contracts relating to the sale of broadcast time to 'time brokers' for resale." 47 C.F.R. § 1.613(c) (1972). On November 8, 1972, the Commission altered its regulations and only required time brokerage contracts to "be kept at the station and made available for inspection upon request." *See* 47 C.F.R. § 1.613(d) (1976); 25 RR 2d 1719, 1722 (1972). The change was

tween Radio Broadcast Stations and Musical Format Service Companies, 56 FCC 2d 805, 809 (1975).

In this case, it is beyond dispute that Cosmopolitan engaged in extensive time brokering. Approximately 75% of WHBI's air time was sold to time brokers. Cosmopolitan did not seek out these time brokers, nor did it involve itself in their day-to-day programming decisions. All of WHBI's foreign language broadcasts were time brokered, as was the English-language program "Kaleidoscope." Kaleidoscope was an early morning show broadcast between 3:00 a.m. and 6:00 a.m., Monday through Friday, and from 2:00 a.m. to 3:00 a.m. on weekends. The time broker for Kaleidoscope was, for all practical purposes, Dean Lewis (no relation to Donald Lewis, the principal stockholder of Cosmopolitan). J.A. at 18. Dean Lewis resold Kaleidoscope's time in five minute segments to whoever would buy it; customers were attracted through advertisements promising them on-the-air "training" and the opportunity to produce and host their own radio programs. The ALJ found that Dean Lewis' customers "were allotted free reign as to the content of the programs which they prepared for broadcast. They were also free to make whatever sales they could of commercial time within the periods they would program." J.A. at 48. Donald Lewis had no contact with those who were broadcasting over the air during Kaleidoscope.

Based on this record, the Commission sustained the ALJ's conclusion that Cosmopolitan had failed to exercise adequate control and supervision over the programming of WHBI, stating that:

> The primary reason for Cosmopolitan's lack of control and supervision over programming and operations is readily apparent: virtually every available

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made "[t]o reduce the administrative detail of the Commission . . . ." *Id.* at 1722.

> minute of broadcast time on WHBI was sold to time brokers, who either provided programming or resold smaller blocks of time to subbrokers.

59 FCC 2d at 560. In its Memorandum Opinion and Order the Commission stated that "Cosmopolitan relinquished virtually all control over the station's programming to time brokers . . . ." 61 FCC 2d at 258.

Cosmopolitan, however, attacks this conclusion. It argues that Cosmopolitan did in fact maintain control over its programming by selecting time brokers and by specifying basic program formats and languages.[8] Cosmopolitan cites several FCC decisions for the proposition that the delegation of the day-to-day programming decisions is entirely consonant with Commission policy. *See Inquiry into Subscription Agreements Between Radio Broadcast Stations and Musical Format Service Companies*, 56 FCC 2d 805 (1975); *Stern Community Law Firm*, 34 FCC 2d 483 (1972); *Licensee Responsibility to Review Records Before Their Broadcast*, 31 FCC 2d 377 (1971). Cosmopolitan contends that the Commission was, contrary to its previous policy, in fact ruling against extensive time brokerage *per se*.

We think that Cosmopolitan's arguments fundamentally misconstrue the Commission's position. The Commission regarded Cosmopolitan's time brokerage as evidentiary of the legally dispositive question, which was whether Cos-

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[8] Cosmopolitan claims that Donald Lewis meets with and explains to time brokers, orally and in writing, FCC rules and regulations. Cosmopolitan also states that Lewis makes concrete suggestions as to the basic format and general content of the proposed programs. By this Cosmopolitan means that Lewis agrees with time brokers about the languages in which their programs will be broadcast, the general ethnic orientation of their programs, and the fact that their programs will contain a mix of ethnic news and announcements. Within these basic parameters, Cosmopolitan concedes that time brokers have complete discretion as to program content.

mopolitan had abdicated control over the programming of station WHBI. In concluding that this control had in fact been relinquished, the Commission specifically relied "on the *totality* of the licensee's *modus operandi*." 61 FCC 2d at 258. This necessarily included the Commission's analysis of Donald Lewis's relationship to his time brokers,[9] and the fact that WHBI initiated virtually no programming of its own.[10] While it is true that "[l]icensee responsibility does not require . . . that the licensee . . . choose every record to be played on a particular program," *Stern Community Law Firm*, 34 FCC 2d 483, 484 (1972), nevertheless a "*responsible* public trustee" is "called upon to make thousands of programming judgments over his license term." *Licensee Respon-*

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[9] *See* J.A. at 8-14, 42, 45-47; 59 FCC 2d at 561-62; 61 FCC 2d at 258; Brief for appellee at 6-7. Cosmopolitan brought the facts concerning Lewis's relationship to WHBI's time brokers to the attention of the Commission by way of exceptions to the ALJ's decision. *See* Exceptions 11, 12; J.A. at 78-80. The Commission denied these exceptions. 59 FCC 2d at 565.

Also relevant, of course, is Lewis's relationship to the sub-brokers who bought time from the time brokers and produced much of the actual programming. In this connection, it is undisputed that Lewis had virtually no contact with the sub-brokers who broadcast on the Kaleidoscope program.

[10] Most of WHBI's broadcast time that was not contracted out to time brokers was sold to religious groups who provided their own programming. Broadcast Bureau, Exhibit 1. Cosmopolitan strenuously points out in its brief that WHBI programmed two five minute daily news broadcasts (gathered from the Associated Press teletype), a daily 14 minute broadcast of racing information (also taken from the Associated Press teletype), three or four weekly 90 second editorials, and a weekly 14 minute interview program (that ran for approximately one year). Reply brief for appellant at 12. We note that Cosmopolitan brought these facts to the attention of the Commission, *see* Exception 5, and that the Commission ruled that they were "of no decisional significance." 59 FCC 2d at 565. We do not find this ruling to be arbitrary or capricious.

sibility to Review Records Before Their Broadcast, 31 FCC 2d 377, 379 (1971). In all of the cases cited by appellant, the Commission forcefully reiterated its long-standing policy of requiring "broadcast licensees to be ultimately responsible for programming, regardless of the source." *Inquiry into Subscription Agreements Between Radio Broadcast Stations and Musical Format Service Companies*, 56 FCC 2d 805, 807 (1975). In this case the Commission concluded that Lewis's vague relationship to his time brokers' programming was insufficient to fulfill that responsibility. Although the Commission has permitted the delegation of some day-to-day programming chores, it has never intimated that a licensee can meet his responsibility to the public by merely choosing a general program format and the language in which it is to be broadcast. In this area of mixed legal and factual judgments, "we defer to the expertise and experience of the Commission within its field of specialty and would reverse only where the Commission's position is arbitrary, capricious or unreasonable." *West Michigan Telecasters, Inc. v. FCC*, 396 F.2d 688, 691 (D.C.Cir. 1968); *cf. NLRB v. Local Union No. 103, International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 98 S.Ct. 651, 656 n.7 (1978). Since the Commission's ruling is not arbitrary, capricious or unreasonable, and since it does not lack the "reasoned decision making" we required in *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1025-26 (D.C.Cir. 1971), we affirm it.

B. *Failure to Retain Familiarity with Programming*

A licensee cannot adequately fulfill his responsibility to maintain control over his programming unless he knows what is actually being broadcast over his station. Normally a station's engineer will monitor its broadcasts, but in the case of stations that broadcast in a variety of foreign languages retaining familiarity with the con-

tent of programming can often prove exceedingly difficult. For example, neither Donald Lewis nor any of WHBI's regular paid staff understands any of the languages broadcast over WHBI. Nevertheless, the Commission has refused to "carve out in this area a special exception to licensee responsibility":

> The desirability of foreign-language program service does not . . . relieve the broadcaster of his responsibility for his programming, which in turn necessarily depends upon his adoption of reasonable procedures for assuring himself that the programming conforms to his policies and the requirements of the law.

Licensee Responsibility To Exercise Adequate Control Over Foreign Language Programs, 39 FCC 2d 1037, 1039 (1973) (*1973 Policy Statement*).

The Commission made this policy known as early as 1967, when it stated:

> Licensee responsibility requires that internal procedures be established and maintained to insure sufficient familiarity with the foreign languages to know what is being broadcast and whether it conforms to the station's policies and to requirements of the Commission's rules.
>
> Failure of licensees to establish and maintain such control over foreign language programming will raise serious questions as to whether the station's operation serves the public interest, convenience and necessity.[11]

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[11] The Notice also stated that:

> Essential to the exercise of proper licensee responsibility in this matter is knowledge of the content of such broadcasts. Commission inquiry reveals that a number of licensees have no familiarity with the foreign languages and, thus, no knowledge of the content of such broadcasts. They explain their

Public Notice re Foreign Language Programs, 9 RR 2d 1901 (1967) (*1967 Policy Statement*).

Concerned with the *1967 Policy Statement*, Donald Lewis sent the Commission an unsolicited letter on October 25, 1967, describing the procedures he had instituted to monitor WHBI's foreign language broadcasts. S.J.A. at 6-10. Essentially, Lewis had hired multi-lingual monitors to listen, at random, to at least 15% of the station's foreign language programming.[12] The monitors were

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practices as follows: (1) they permit only persons of established reputation for judgment and integrity to use their facilities; (2) copies of commercial announcements used on foreign language programs must be submitted in advance in English translation; (3) recordings of all programs are made and retained for future reference. We do not regard such procedures, in and of themselves, as sufficient to insure licensee knowledge of and control over foreign language programming.

Id.

[12] Lewis stated in his letter that:

Cosmopolitan Broadcasting Corp. recognizes that licensee responsibility requires the implementation of procedures to insure sufficient familiarity with foreign languages so that the licensee will broadcast only material which conforms to the station's policies and to requirements of the Commission's Rules and Regulations. However, as the Commission realizes, the hiring of engineers familiar with all 16 languages broadcast by WHBI would be expensive, impractical, and probably impossible. The procedure WHBI has adopted to maintain knowledge of and control over foreign language programming is the hiring and utilization of monitors familiar with the various foreign language broadcast by the station.

Station WHBI has hired a number of its regular listeners to monitor at least 15% of the foreign language programming on a formal written basis. Being regular listeners, far more than that 15% is monitored on an informal, nonwritten basis. Since the performers never know when they are being monitored, and since they may be eliminated from WHBI if they

given a memorandum describing "objectionable material which must be reported to the station at once." S.J.A. at 10. The memorandum contained explanations in lay language of obscenity,[13] personal attacks,[14] and exhortations to break the law.[15] In addition, the monitors were given

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disregard station or Commission requirements, it thus behooves them to always comply. The monitors are paid for their services and certify to their expertise in the particular language involved.

S.J.A. at 7.

[13] The memorandum directed monitors to report "Any statement which is considered 'Dirty' (or bad word or words that polite people would never use). Any statement or word that has a 'double' meaning (both good and bad)." *Id.* at 10.

[14] Monitors were asked to report:

> Any statement which seems to or does say bad or insulting things about someone, dead or alive. Any statement telling the public to hate a person, to criticize a person, or to make him look foolish. Any statement that says bad things about a person's job or business. Any statement which says a person is dishonest or of bad character. Any statement which says a person is immoral or indecent (perhaps relating to sex). Any statement which criticizes the way a person does his work (such as calling a doctor a "quack or butcher"). Any statement in which a person is called a criminal or accused of committing a crime (unless already proved guilty). Any statement which says bad things about a person, several people, a corporation, a product, or even a place or thing which would tend to hurt their reputation; such as saying they are dishonest and lacking in ability, or some such similar words.

Id.

[15] Monitors were alerted to report:

> Any statement which seems to or does tell people to break a law or to commit a crime. Any statement which tells people to organize and get together and do something illegal against another person, persons, or to damage their property. Any statement which tells people to act violently or harmfully . . . or to tell people to riot.

Id.

written forms to fill out describing each monitored program.[16] The form required the monitor to check if certain kinds of broadcasting were offered during the program (*e.g.*, "news," "music," "sports," "political," etc.),

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[16] A copy of the report form was appended to the October 25 letter:

Program: _____ Date: _____

Language: _____ Beginning Time: _____

Ending Time: _____

Routine Commercials	——	Religion	——
News	——	Sports	——
Social Notes	——	Interviews	——
Education	——	Political	——
Station Identification	——	Audience Requests	——
Music	——	Other:	_____

The undersigned certifies the accuracy of the content of the foregoing as broadcast over Radio Station WHBI at the time and date indicated.

I have examined the list of commercials (spot announcements) annexed hereto, and certify that the announcements actually made coincide with the list except:

I found no vulgarisms, profanity, double entendre, or matters of questionable taste, nor have I found any material which would be classed as objectionable in regard to slander, incitement to riot, defamation of character, or dishonest advertising, as contained in the memorandum supplied to me dated

Date: _____

Signed: _____

Id. at 8.

Monitors received a memorandum entitled "Explanation of Monitoring Forms & Procedures," which instructed them how to fill out their written reports. The Memorandum stated:

> Each monitor report will have marked on it by us the date and time of the program to be monitored with that sheet. Looking at that sheet, you can see the subjects which might be in a program. When listening, merely put a checkmark

to check the commercials broadcast for length and for sponsor's name against a prepared list, and to check for objectionable material and for dishonest advertising.

The Commission never acknowledged or responded to Lewis's letter. On February 20, 1968, the Commission sent Cosmopolitan a letter requesting, among other things, information concerning Cosmopolitan's compliance with the 1967 Policy Statement. On April 19, 1968, Donald Lewis responded with a letter referencing the October 25 correspondence and including additional forms regarding the directions Cosmopolitan gave its monitors.[17] The Commission never responded to this letter.

In affirming the ALJ's decision, however, the Commission found that Cosmopolitan's monitoring system was inadequate because monitors failed to "evaluate substantive program content."[18] 59 FCC 2d at 561. We affirm

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beside the kinds of subjects you heard. Also included will be a separate list of commercials for that program. To the right of each sponsor's name will be numerals indicating the estimated maximum length for each commercial. As you hear each commercial, please put a checkmark beside each sponsor's name. As for the timing or length, if it is as long as, or shorter than the indicated length, merely put a checkmark next to the correct numerals. That means it is okay. If it is longer than indicated, please tell us this on the monitor report. If you heard commercials that were not on that attached list, or if you heard them more times than listed (listed once but broadcast twice, for example) please also tell us that on the monitor report.

WHBI, Exhibit 25. This Memorandum was not sent to the Commission on October 25, but was included in a letter sent to the Commission by Cosmopolitan on April 19, 1968.

Monitors were paid $1.00 for each report filed.

[17] *See* S.J.A. at 11-20; WHBI Exhibit 25; note 16 *supra*.

[18] The Commission also stated that:

Cosmopolitan claims it pointed out certain prohibited practices —use of obscenity, slander and libel, violations of the fairness

the Commission's finding. The purpose of the monitoring reports is to enable a licensee to retain sufficient familiarity with his broadcasts to exercise his responsibility as a public trustee. But this responsibility requires that a licensee be familiar with the actual content of his programming. The fairness doctrine, for example, requires that a licensee provide fair and accurate news reporting. *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 FCC 2d 1, 21 (1974), that he make available a reasonable opportunity for the presentation of opposing viewpoints about controversial issues of public importance, *id.* at 10-17, and that he devote adequate broadcast time to the discussion of public issues, *id.* at 9-10. The limited information provided on Cosmopolitan's monitor reports [19] could not possibly have enabled Donald Lewis to know if his foreign language time brokers were fulfilling these obligations.

Cosmopolitan argues, however, that the Commission's lack of response to its October 25 and April 19 letters constituted an implicit endorsement of Cosmopolitan's

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doctrine, and broadcast of lottery information—which it felt monitors should be aware of. Yet, by its own admission, it did not instruct prospective monitors in formal Commission requirements, opting instead for a "Memorandum," in English, containing a simplified summary of "objectionable material" which should be reported to the station. We believe the record amply supports the Judge's finding that ". . . evidently none of the monitors [had] direct knowledge of FCC Rules."

59 FCC 2d at 561-62. Insofar as the Commission's point is that the simplified summary of "objectionable materials" was incomplete, omitting, for example, a thorough explanation of the fairness doctrine, we agree with the Commission's finding. We disapprove, however, the implication in the Commission's ruling that a licensee cannot translate FCC regulations into plain comprehensible English for its monitors.

[19] *See* note 16 *supra*.

monitoring system.[20] We disagree. The adequacy of Cosmopolitan's monitoring system could have been definitively assessed only in the context of WHBI's total method of operation. *See Wolfe Broadcasting Corp.*, 32 FCC 2d 761, 763 (1971). Deficiencies in the monitor reports might have been remedied by supplementary connections between Lewis and his foreign language time brokers. When it became clear at Cosmopolitan's license renewal hearing that the monitor reports were virtually Lewis's sole source of knowledge concerning the day-to-day foreign language programming of WHBI, their deficiencies for the first time became fully manifest.

C. *Other Violations*

The ALJ found that Cosmopolitan had violated numerous FCC regulations.[21] The Commission found these violations to be the result of Cosmopolitan's abdication of responsibility.

> As a result of its abdication of licensee responsibility, numerous violations of Commission Rules occurred, including (but not limited to) the promotion of a lottery, false and misleading advertising, improper logging, failure to meet filing requirements, and inadequate record keeping. To quote [the ALJ], all this resulted from "a maximum resale of time and a minimum of control over how that time was actually used."

59 FCC 2d at 560.

Cosmopolitan now attempts to characterize many of these violations as "inconsequential." Reply brief for

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[20] On January 9, 1969, the Commission granted Cosmopolitan's petition to relocate its main studio from its transmitter site to Riverside Drive in New York City. Cosmopolitan argues that this action also was an implicit ratification of its monitoring system.

[21] *See* p. 8 and note 3 *supra*.

appellant at 33. This argument fundamentally misconstrues the Commission's position, which is not that these violations were intrinsically serious, but that they were probative of an underlying abdication of licensee responsibillty. *See Continental Broadcasting, Inc.*, 15 FCC 2d 120, 129-31 (1968), *aff'd*, 439 F.2d 580 (D.C.Cir. 1971).

Cosmopolitan also argues that two of the violations found by the ALJ are not supported by the record. First, Cosmopolitan finds error in the ALJ's ruling that WHBI failed to fulfill its promise in its 1969 license renewal application that it would broadcast 3 hours of news per week. Cosmopolitan claims to have broadcast 5 hours and 55 minutes of news per week, as evidenced by a composite week drawn from dates during the 1969-72 license term. Reply brief for appellant at 31-32. But Cosmopolitan admits that of this time only 47 minutes consisted of newscasts presented by WHBI's staff. Three hours and 40 minutes of the remaining time consisted of news produced by time brokers. This latter time cannot be counted as fulfilling Cosmopolitan's non-delegable duty to present news, since "[i]t is the licensee . . . who must select or be responsible for the selection of the particular news items to be reported or the particular local, State, national or international issues or questions of public interest to be considered . . . ." *Editorializing by Broadcast Licensees*, 13 FCC 1246, 1247 (1949). In addition the ALJ concluded, and we see no reason to disagree, that the remainder of the programming Cosmopolitan designated as "news" was in fact tapes dealing with current developments made available by various State and public agencies, none of which "can be counted as news." J.A. at 53.

Second, Cosmopolitan argues that there is no evidence in the record, and that the ALJ's own findings of fact contradict his conclusion that rates charged to political

candidates "in a few instances . . . exceeded normal commercial rates for similar time." J.A. at 51. The ALJ's findings of fact, however, disclose examples of time brokers charging a political candidate $17.50 per minute for announcements, while at the same time charging commercial advertisers between $5 and $17.50 per minute for comparable air time. J.A. at 32-3. The ALJ did state that:

> One explanation for the political charges was the fact that the time broker was paid not only for broadcast time but also for his services in preparing and announcing the copy for a political candidate. Nevertheless, there was no separation of charges between services and broadcast time.

J.A. at 51. Unfortunately, the ALJ did not support his conclusion by citations to the record, and neither did the Commission.[22] We cannot stress too strenuously the importance of such citations. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 62 (D.C.Cir.) (Bazelon, C.J., concurring), *cert. denied*, 426 U.S. 941 (1976); *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 23 (D.C.Cir. 1950), *cert. denied*, 340 U.S. 952 (1951); *cf. Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm'n*, 569 F.2d 831, 837-38 (5th Cir. 1978); *Cooper Laboratories, Inc. v. Commissioner, FDA*, 501 F.2d 772, 787 (D.C.Cir. 1974). We cannot know in their absence precisely upon what evidence the Commission or the ALJ relied in reaching their factual conclusions. Thus we are left without guidance to scour the massive ten volume record in this case for ourselves, to speculate whether or to what extent, if any, the Commission relied upon and appropriately considered any evidence that we may unearth, and to evaluate this evidence without direction from the Commission. This

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[22] In fact, at *no* point in his decision did the ALJ support his factual conclusions by citations to the underlying record. The Commission referred to the record only fleetingly.

procedure is both wasteful of judicial resources and inconsistent with the proper deference due the Commission. In this case, however, this wasteful procedure may be avoided because Cosmopolitan points to no evidence at all in support of its assertions. Reply brief for appellant, 29-31. Particularly in light of the Commission's prima facie demonstration of violations, Cosmopolitan must bear the burden of proof, 47 U.S. § 309(e), and we therefore support the Commission in this matter.

III. The Merit of WHBI's Programming

The FCC will at times permit the presentation of evidence as to the past programming of licensees in renewal proceedings involving character qualifications issues. "Such evidence is allowed on the theory that a meritorious program record may mitigate the significance of adverse findings under those issues." *Medford Broadcasters, Inc.*, 18 FCC 2d 817, 818 (1969).[23] Of course, the addition of the meritorious programming issue does not foreclose the right of parties subsequently to argue as to the weight that should be accorded the evidence adduced. *Midwest Radio-Television, Inc.*, 18 FCC 2d 1011, 1014 (1969).

At Cosmopolitan's request, an issue was added to its license renewal hearing "to determine whether the programming of Station WHBI (FM) has been meritorious, particularly with regard to public service pro-

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[23] The Commission thus reviews the merits of programming only *after* a licensee has been found at a hearing to have been guilty of infractions of FCC regulations, and only as a factor that may mitigate the consequences of these infractions. In these circumstances the Commission's consideration of programming content is not likely to chill licensee programming decisions or to "threaten [a] licensee with censorship." *Citizens Committee To Save WEFM v. FCC*, 506 F.2d 246, 280 (D.C. Cir. 1974) (Bazelon, C.J., concurring in the result). We therefore see no fatal conflict with First Amendment values.

grams." [24] At the hearing, Cosmopolitan produced testimony and affidavits from scholars like Dr. Margaret Mead, Dr. Mario Pei, and Dr. Gene Weltfish, to the effect that foreign language and ethnic programming was valuable to immigrants and to second and third generation members of ethnic groups. This evidence was for the most part based upon study of general descriptions of WHBI's programs.[25]

The ALJ resolved this issue against Cosmopolitan. On appeal the Commission noted that it had "no quarrel with the general proposition that ethnic programming serves an important purpose," but it stated that it could not conclude "that foreign language programming is *per se* meritorious. . . ." 61 FCC 2d at 260. The Commission observed that "[w]hile Cosmopolitan alleges some programming responsive to the meritorious programming issue, it was not able to substantiate this claim from program logs submitted in evidence." 59 FCC 2d at 564. Since Cosmopolitan's English language programming "was unresponsive to obligations imposed on a licensee" to serve the community of its license, 61 FCC 2d at 261, the Commission upheld the ALJ.

Cosmopolitan attacks the Commission on several fronts. It argues, first, that the merit of WHBI's English language programming should not have been assessed in terms of WHBI's service to Newark, the city of its license. Cosmopolitan contends that it expressly stated in its 1966 license renewal application its intention of operating WHBI primarily as a foreign language/ethnic specialty station, serving ethnic minorities through the Newark-New York metropolitan area. *See* J.A. at 109-14. The Commission's approval of that application, Cos-

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[24] *See* note 4 *supra*.

[25] *See* WHBI Exhibit 6, S.J.A. at 31-58.

mopolitan argues, is inconsistent with its present evaluation of WHBI's English language programming.

We find Cosmopolitan's argument to be without merit. The issue before the Commission was whether "the programming" of WHBI had been meritorious, not merely whether its foreign language programming had been especially deserving. That the Commission had implicitly approved Cosmopolitan's plan to aim much of its programming at ethnic minorities throughout the New York and Newark metropolitan area did not exempt from the requirements of licensee responsibility the remainder of its programming. More than 30% of WHBI's programming was in English, and the Commission was surely entitled to evaluate this programming according to its customary standards.

Second, Cosmopolitan condemns as "arbitrary, capricious, [and] an abuse of discretion" the Commission's finding that WHBI's foreign language programming was without special merit. *See* 5 U.S.C. § 706(2)(A). Cosmopolitan contends that it presented substantial evidence concerning the meritorious content of its foreign language programming and that the Commission's requirement that the merit of WHBI's programming be demonstrated from program logs was irrational, since such logs would at most reflect that certain types of programming had been broadcast and "would have provided virtually no information as to the substantive content of the programs logged." Brief for appellants at 65 n.58. *See* 47 C.F.R. § 73.282 (1976).

We do not interpret the Commission's reference to program logs to constitute an implicit rule that no evidence other than program logs will be considered in the determination of program merit. With the guidance of appellee's brief, we construe the Commission's point to be that a licensee can receive special merit only if it

offers, if not program logs, at least comparable "evidence of the 'substantive content' of its programming," brief for appellee at 44, and that Cosmopolitan had failed to offer such evidence. *Id.* at 42-44.

We agree with the Commission that program logs would provide evidence of the substantive content of the programs logged. Proper logging requires a licensee to classify its programs by content into, for example, news, entertainment, religious, instructional, political or editorial programs, *see* 47 C.F.R. § 73.282(b)(1)(iii) (1976), and thus provides the Commission precise, reliable evidence of the actual amount of broadcast time in each of these subject areas.[26] We assume, therefore, that by sustaining the ALJ's conclusion that WHBI's foreign language programming lacked special merit, the Commission was implicitly holding that Cosmopolitan had failed to produce evidence of comparably probative value.

If Cosmopolitan had in fact merely rested its case on the proposition that foreign language programming was meritorious *per se*, we would more easily tolerate such elliptical reasoning on the part of the Commission. But the Commission's brief manifestly misrepresents the record when it states that the record "shows that WHBI could present no evidence to support the 'merit' of its foreign language programming, other than the fact that since 1969 it sold air time to time brokers broadcasting in over twenty foreign languages." Brief for appellee at 44. Even putting aside the expert testimony offered by appellant concerning the value of foreign language programming, Cosmopolitan offered a great deal of evidence

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[26] Cosmopolitan claims that in its 1966 license renewal application it explained to the Commission that these elements were so intermixed in its foreign language programs that they could not be separately logged. Brief for appellants at 65 n.58. We note, however, that FCC regulations permitted licensees to break down programs into "separately identifiable program units." *See* 47 C.F.R. § 73.282(a)(1)(ii) (1967).

concerning the substantive content of WHBI's programming. This evidence ranged from the vague,[27] to the anecdotal,[28] to the very specific.[29] Some of the evidence

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[27] In its Exhibit #6, S.J.A. at 31-58, Cosmopolitan provided an over-all description of its foreign language broadcasts. A representative sample is the discussion of the program *Happy Greek Morning*:

> *Happy Greek Morning* (1968-present). This Greek language program is broadcast on Friday mornings between 8:00 and 9:00 a.m. The program's producer/performer, Demetrios Vassos, who received an education in law in Greece, presently operates a travel agency. "Happy Greek Morning" features Folk and classical Greek music, community news and information and public service messages. In 1972, Mr. Vassos added to his program approximately 6 minutes of news from Greece and around the world.

S.J.A. at 43.

[28] Cosmopolitan introduced testimony by several time brokers describing the content of their respective programs. Some of this testimony was anecdotal in nature as, for example, when Ferenc Koreh, producer of a program entitled American Hungarian Voice, was asked whether the portion of his program devoted to community news and information was broadcast on a regular weekly basis:

> A. It depends on when our community news is. It usually is on and I give some other information, all the other information that you cannot get from the American radio and newspapers.
>
> Q. Could you give an example of the type of information that they could not get?
>
> A. For example, it happened not long ago that some Hungarian tourists and Rumanians were touring the United States and Canada and I gave this information to the community.
>
> But there are many such informations. The Hungarian Scouts in Exile are arranging an evening. They are not paying for this. This is a public service. It is an information because I am helping the community and the Scouts at the same time.

Transcript at 1453-54.

[29] For example, Elfredo Rendiero, producer of a program entitled "The Voice of Portugal," testified that the content of his program

offered by Cosmopolitan provided even more information than would be ascertainable from program logs. In Exhibit 54, for example, Cosmopolitan offered a "representative listing" of about 75 prominent guests interviewed on WHBI's foreign language programs, the ap-

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consisted of "Music, news, interviews and items of interest to the Portugese community":

> Q. Is the music you play Portugese music?
>
> A. Portugese and Brazilian music.
>
> Q. And is the program broadcast the Portugese language?
>
> A. Yes, sir.
>
> Q. Do you broadcast a news program within the body of the program?
>
> A. Yes, I do.
>
> Q. And at what time is that broadcast?
>
> A. 6:00 o'clock. There is one segment at 6:00, and there is another one at 5:30.
>
> Q. The segment at 6:00 is how long?
>
> A. Ten minutes.

Transcript at 1223-24. Mr. Rendiero's testimony was uncontradicted, and contained information of comparable specificity to that which could be obtained from program logs.

Again, I. K. Asghar, producer of a program entitled "Pakistani Hour" broadcast in the Urdu language, offered uncontradicted testimony concerning the substantive content of this program:

> Q. In the exhibit we were just looking at, Exhibit 6, there's a news segment in the program. Can you tell us how much of your program prior to December, 1972, was devoted to the news of Pakistan?
>
> A. First of all it depends very much on how many news items we have every week; sometimes we receive a number of items; then we give more time. But, let us say about five to seven minutes is normal, five to seven minutes; but sometimes it happens that the news is more; then we give more time; if the news were less, then it would be about five to seven minutes.

Transcript at 1869.

propriate date and duration of the interviews, and the principal topics discussed.[30]

The Commission's sibylline conclusion that Cosmopolitan had failed to demonstrate programming merit "from program logs" entirely ignores this evidence. We thus have no way of knowing whether the Commission even considered this evidence, much less its reasons for finding this evidence insufficient to establish the meritoriousness of WHBI's foreign language programming. Our function when reviewing the action of an administrative agency, however, is precisely "to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C.Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Since on this record we cannot be assured that the Commission "has given reasoned consideration to all the material facts and issues," we cannot affirm its conclusion that WHBI's foreign language programming lacked special merit.

The issue of meritoriousness is of course for the Commission to determine in the exercise of its statutory authority. In such matters a "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416

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[30] At the hearing, the Broadcast Bureau objected to Exhibit 54 on hearsay grounds, transcript at 2756, and the ALJ sustained the objection for reasons that are not entirely clear. When Cosmopolitan carried forward their exception ot this ruling, Exception 71, the Commission ruled that it was "of no decisional significance." 59 FCC 2d at 567.

(1971). We therefore remand this case to the Commission for a more reasoned consideration of this question.

On remand the Commission will also have the opportunity to correct what has to date been a serious omission in its deliberations concerning the meritoriousness of WHBI's programming. The ultimate question to be determined by the Commission is whether the renewal of Cosmopolitan's license will serve "the public interest, convenience, and necessity." 47 U.S.C. § 309(a). We have long recognized, however, that "it is surely in the public interest, as that was conceived by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible. *Citizens Committee of Atlanta v. FCC*, 436 F.2d 263, 269 (D.C. Cir. 1970). For this reason we have held that "[t]here is a public interest in a diversity of broadcast entertainment formats."

> The disappearance of a distinctive format may deprive a significant segment of the public of the benefits of radio, at least at their first-preference level. When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment . . . .

Citizens Committee To Save WEFM v. FCC, 506 F.2d 246, 262 (D.C. Cir. 1974). We stated in *Citizens Committee to Save WEFM* that "the public interest implicated in a formal change is the interest of the public

in the service area, not just the city of license." *Id.* at 263.

Although the issue in this case is not that of a format change, we believe that the reasoning of *Citizens Committee to Save WEFM* is applicable to the question of whether WHBI's programming deserves special merit. Meritorious programming, after all, is that programming which serves the public interest, convenience and necessity. In determining whether the past programming of WHBI may have mitigated its derelictions of character, the Commission should therefore consider whether denying Cosmopolitan's application for a license renewal will silence a unique outlet serving "a specialized audience that would feel its loss." [31]

There is some evidence of the uniqueness of Cosmopolitan's programming presently in the record. *See, e.g.*, transcript at 1864-65. In addition Cosmopolitan offered as evidence in Exhibit 33 a survey of the foreign langauge programming broadcast by other stations in its service area. The ALJ, however, refused to accept Exhibit 33, stating that "if the programming relied upon by WHBI is in fact by its nature meritorious, then it is in fact meritorious regardless of whether or not it is aired by any other station. If it is not meritorious, I do not think you can create merit in programming by reason of

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[31] The numerous intervenors in this case are evidence of the concern of members of ethnic language groups within WHBI's signal area at the loss of the outlet provided by WHBI. Intervenor briefs have been filed by the Iran Club, the Bulgarian American League, the Yugoslav Consolidated Benevolent Association, the Congress of Portuguese People, the Japanese Association of New York, and the Federation of Lithuanian Women's Clubs. There have also been filed briefs for appellants Hungarian Freedom Fighters Association and Columbian Lawyers Association. These briefs strenuously argue the value of WHBI's programming to their respective ethnic communities.

the fact that no other station carries that particular language." [32] Transcript at 2575. *See id.* at 2568-2579.[33] This ruling is wrong as a matter of law: where there is a likelihood that a license may not be renewed. determination of the meritoriousness of programming must include consideration of the uniqueness of that programming to a significant segment of the public.

On remand, we expect the Commission to give due regard to this consideration. We of course express no view as to whether consideration of this factor will affect the Commission's ultimate determination of the meritoriousness of WHBI's foreign language programming or as to whether, even if found meritorious, the seriousness of Cosmopolitan's other violations might be mitigated enough to deserve the imposition of a lesser sanction. *See SEC v. Chenery Corp.*, 318 U.S. 80, 93-95 (1943).

The case is remanded to the Commission for further proceedings consistent with this opinion.

So ordered.

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[32] There were some questions raised as to the competency of the evidence proffered by Cosmopolitan. Transcript at 2579. We intimate no view on this question.

[33] Although Cosmopolitan did not carry forward its objection to the ALJ's ruling, it did present to the Commission an exception to the ALJ's finding that "[w]e can give Cosmopolitan some credit for its ethnic broadcasts but except for variety, there is no other merit shown." In this exception Cosmopolitan argued to the Commission that "[b]y presenting programming in a multitude of foreign languages, *many of which are not available on any other radio station within WHBI's service area*, WHBI has been providing a valuable service to the members of numerous foreign language and ethnic groups residing in Newark and the New York metropolitan area." Exception 100, Exceptions of Cosmopolitan Broadcasting Corp. to Initial Decision at 90 (emphasis added).

LEVENTHAL, *Circuit Judge, concurring*: I concur in the opinion of the court, and in its remand to the Commission for reconsideration and clarification of the issue of meritoriousness. I add a word only to note that options are open to the Commission on remand.

It is possible that the Commission will determine, on remand, that petitioner offers a unique and valuable service to foreign language listeners, but that this value does not sufficiently counterbalance petitioner's deficiencies, in failing to retain control of its programming, to warrant renewal of its license. Or the Commission may be of the view that this service, while valuable, can be provided by other potential licensees who would seek the license in a competitive hearing, and offer service without the identified deficiencies.

There are doubtless other options available to the Commission to achieve the continuation of foreign language services, if the Commission should determine that the public interest warrants their preservation.

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 74D-41
26333

Docket No. 19657

File No. BRH-1359
BRSCA-746

IN RE APPLICATION OF
COSMOPOLITAN BROADCASTING CORPORATION
NEWARK, NEW JERSEY

FOR RENEWAL OF MAIN, AUXILIARY & SCA
LICENSE FOR WHBI (FM)

Appearances

Thomas Schattenfield, Esq., and *David Tillotson, Esq.*, on behalf of Cosmopolitan Broadcasting Corporation; and *Joseph Chachkin, Esq.*, and *Robert Ross, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE ERNEST NASH

Issued: July 19, 1974; Released: July 25, 1974

1. Cosmopolitan Broadcasting Corporation's applications for renewal of licenses authorizing operation of station WHBI(FM), Newark, New Jersey (WHBI(FM)) were filed on February 26, 1969 and supplemented on March 2, 1972. On December 19, 1972, the Commission

released an Order and Notice of Apparent Liability designating these applications for hearing on the following issues:

(a) To determine whether the applicant has exercised adequate control and supervision over the programming and other operation of Station WHBI consistent with licensee responsibility.

(b) To determine whether the applicant broadcast deceptive or misleading advertising.

(c) To determine whether the licensee permitted a time broker to use the licensed facility in furtherance of a scheme to obtain monies from persons who were misled to believe they were being offered employment when, in fact, the purpose was to obtain purchases of a time broker's service, facilities, air time or course of instruction and training.

(d) To determine whether the applicant failed timely to file with the Commission contracts relating to the resale of broadcast time in violation of Section 1.613(c) of the Commission's Rules.

(e) To determine whether the applicant failed to make entries in the program logs of WHBI properly identifying the political affiliation of certain candidates for public office in violation of Section 73.282 of the Commission's Rules.

(f) To determine whether applicant failed to maintain certain records and make them available for public inspection as required by Section 73.289 (f) and 73.290(d) of the Commission's Rules.

(g) To determine whether the rates charged for announcements broadcast by WHBI on behalf of candidates for political office exceeded that charged for announcements broadcast by WHBI for other candidates and other commercial adver-

tisers and, if so, whether this practice violates the fairness doctrine or by engaging in that practice the licensee is otherwise not serving the public interest by discouraging candidates for political office from using the licensed facility.

(h) To determine whether the applicant failed to make proper entries in the program logs of WHBI containing information pertaining to foreign language programs in violation of Section 73.281 (a) of the Commission's Rules.

(i) To determine whether applicant has broadcast detailed pre-race information prior to horse racing events and, if so, whether such broadcasts were intended to be of aid to illegal gambling or might reasonably have been expected to be of such aid.

(j) To determine whether applicant broadcast information sponsored by publishers of "scratch-sheets" or other publications disseminating detailed horse racing information by touts or other persons whose activities may result in aiding illegal gambling or furnishing information to illegal gamblers or bookmakers; and if other information was broadcast which may have resulted in aiding illegal gambling on events other than horse racing.

(k) To determine whether applicant broadcast an advertisement or information concerning a lottery in violation of Title 18 U.S.C. Section 1304 (1964).

(l) To determine whether applicant failed timely to file ownership reports to the Commission in violation of 1.615 of the Commission's Rules.

(m) To determine whether the licensee has substantially carried out its representations in its application for renewal in regard to the presentation of news by Station WHBI.

(n) To determine whether in the light of the evidence adduced under the foregoing issues, the licensee possesses the requisite qualifications to remain a licensee of the Commission.

(o) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the captioned application would serve the public interest, convenience and necessity.

2. In addition to directing that a determination be made as to whether it would serve the public interest, convenience and necessity to grant Cosmopolitan's applications for renewal, the Commission, as it has been doing in proceedings of this type, included a forfeiture provision. Thus, as an alternative to a determination that the licensee's renewal applications be denied, consideration is to be given to issuance of an Order of Forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, if it is determined that such action is warranted by a determination that the licensee-applicant has committed violation of 18 U.S.C. 1304[1] within one year of the issuance of the Bill of Particulars specifying such violations.

3. The Broadcast Bureau was directed to serve a Bill of Particulars relative to issues (a) through (m) and it was also given the burden of proceeding with the initial

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[1] 18 U.S.C. 1304—*Broadcasting lottery information*

"Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

presentation of evidence under these issues. The burden of proof was left with the applicant as specified by Section 309(e) of the Act.[2]

4. In a Memorandum Opinion and Order released February 27, 1973 [3] the Review Board added an issue:

> "To determine whether the programming of Station WHBI(FM) has been meritorious, particularly with regard to public service programs."

This issue was added in response to a request for enlargement proposed by Cosmopolitan. In determining that the above issue be added, the Review Board refused Cosmopolitan's request that the determination whether its programming has been meritorious be made, "particularly with regard to programs designed to serve the needs and tastes of ethnic minorities within the station's service area." Instead, the Review Board added the issue in the form usually used and said:

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[2] *Section 309*

> "(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue. . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission."

[3] FCC 73R-89.

". . . Cosmopolitan will have the opportunity to offer evidence on the ethnic oriented phases of its past programming; but these programs do not automatically qualify as meritorious because they have been 'designated' to serve the needs and tastes of ethnic minorities."

5. On July 27, 1973,[4] the Review Board acted on a Broadcast Bureau petition to enlarge issues which had been filed on April 2, 1973, by revising issue (e) to read:

"(e) To determine whether the applicant failed to make entries in the program logs of WHBI properly identifying the political affiliations of certain candidates for public office, failed to log the broadcast of political announcements, failed to identify in the station's program logs the person(s) who paid for political announcements, failed to make program log entries identifying programs by type, and failed to properly explain and sign corrections to program logs in violation of Section 73.282 of the Commission's Rules."

6. A Bill of Particulars was duly served by the Broadcast Bureau on January 17, 1973. Prehearing conferences were held on January 19, April 30 and May 18, 1973. Hearings were held in Newark, New Jersey, over a period beginning June 12 and concluding July 12, 1973. Another conference was held on September 18, 1973 and a final hearing session was held on October 19, 1973. On this date the taking of evidence was concluded and the record was closed.[5]

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[4] FCC 73R-273.

[5] The record was reopened on January 25, 1974, for the purpose of considering the Bureau's request for an extension of time to file proposed findings of fact and conclusions of law and was then again closed on that same date. Both parties filed findings of fact and conclusions on April 8, 1974. Reply findings were finally filed May 17, 1974.

7. WHBI(FM) is licensed to operate on 105.9 MHz at Newark, New Jersey. It went on the air in 1962. Since 1965, WHBI(FM)'s transmitter has been located at 465 Park Avenue, New York City and its main studio has been located at 80 Riverside Drive, New York City since 1968. An auxiliary studio is maintained at 45 New Street, Newark, New Jersey.

8. Cosmopolitan Broadcasting Corporation has been the licensee of station WHBI(FM) since the station went on the air in 1962. At the time WHBI(FM) began broadcasting, Cosmopolitan's stock was owned in equal parts by Donald J. Lewis and Suburban Broadcasting Company, Inc. Eventually, in 1964, Donald J. Lewis became the owner of Cosmopolitan. Donald J. Lewis owns 87 of the outstanding 100 shares of Cosmopolitan's stock. He is president, treasurer and director of Cosmopolitan. Gilbert Siegel, Donald Lewis' New York lawyer, is vice president, secretary and director of Cosmopolitan Broadcasting. Siegel owns one share of stock as does his wife and Charles Okin, another local lawyer retained by Cosmopolitan. Okin and Mrs. Siegal are also directors of the corporation.[6] William Masi who was manager of WHBI (FM) at one time holds ten remaining shares of the outstanding stock in Cosmopolitan. Donald Lewis has authority to vote Masi's stock by the terms of settlement agreement between them which was entered into sometime in late 1970.

9. William Masi was hired by Donald Lewis as station manager just before WHBI(FM) went on the air in 1962. Masi had been conducting a Black oriented program one day a week on the station. He was hired by Donald Lewis who intended to make WHBI(FM) a Black oriented station. To carry out this objective, Donald

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[6] These are qualifying shares owned by directors evidently to meet New York law requirements.

Lewis and Masi sought Black leaders and ministers to broadcast programs which would appeal to the Black population. Their efforts did not succeed because of inability to attract business sponsorship. After six months the attempt to develop WHBI(FM) as a Black oriented station was abandoned and WHBI(FM)'s programming became mainly foreign language and ethnic.

10. WHBI(FM) broadcasts continuously, 168 hours per week. Most of its time (over 75%) is sold to time brokers who pay a flat fee for the broadcast time they use. Time brokers who use WHBI(FM) provide all programming for their allotted time period and sell and broadcast commercials. WHBI(FM) does not participate in the commercial revenue realized by time brokers from their sale of commercial announcements and WHBI(FM) does not participate in the production of the time brokers programs.

11. Almost all of the balance of WHBI(FM)'s broadcast time (about 20%) is either sustaining time or is time sold to people for broadcast of religious programs. About two minutes per hour is reserved by WHBI(FM) for station breaks. This time is used mainly for public service announcements and some commercial spot announcements.

12. WHBI(FM) is operated by a staff which consists of Donald Lewis who owns the station; Allen Collins who is station manager; Sandra Davis who is Mr. Lewis' secretary and five operators who hold 3rd Class FCC licenses. WHBI(FM) does not employ any sales staff or program production staff. It makes no effort to sell commercial spot announcements and all of its programming consists of material produced by time brokers, commercial religious broadcasters or taped materials made available by government or civic organizations. WHBI (FM) does not produce any programs and it has no staff or other facilities for program production.

13. Donald Lewis is in complete charge of policy and operations. He has exclusive control over all time sales to brokers and for the supervision and control which is exercised over their programming and resales of time. Collins' principal function is to see that the station stays on the air. He supervises the operators, assists in scheduling news and public affairs broadcasts, supervises the preparation of the daily program logs and in some cases he checks on delinquent accounts. Davis generally functions as Lewis' secretary and she prepares bills and program logs under Lewis' direction. The various operators function chiefly to man the board and to see to it that program tapes prepared by time brokers and others are played at the appropriate time. Lewis keeps his station expenses down so that he can make time available to brokers at low rates.

14. WHBI(FM) occupies studio space in an apartment building at 80 Riverside Drive, New York City, which is owned by Donald Lewis. Its antenna is located on leased space in a building also located in New York City. An auxiliary studio is maintained in Newark, New Jersey, but it is rarely used, if ever, used.

15. Most of WHBI(FM)'s broadcast revenue comes from the sale of time to brokers. Examination of the financial form (Form 324) filed with the Commission shows gross revenues from sale of broadcast time as follows:

1969	$371,775	1971	$419,507
1970	359,935	1972	452,707

Cosmopolitan objected to making available for the record any other information contained in its financial form.[7]

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[7] Cosmopolitan was ordered to make its Form 324 available to avoid the time consuming project of asking each time broker individually how much he paid WHBI(FM) for broadcast time. For example, it can be estimated from his testimony that Emil Antonoff, a major time broker using WHBI(FM) for foreign language

According to Donald Lewis, a considerable part of the earnings from the station are used to pay costs incurred in connection with his ownership of the seventeen-story apartment-hotel building at 80 Riverside Drive where the main studio is located.

About 68% of WHBI(FM)'s broadcast time is devoted to foreign language programs. Italian is the predominate language programmed over WHBI(FM) followed by Spanish and including a diversity of other languages such as: Polish, Hungarian, Turkish, Portuguese, Greek, Bulgarian and others for a total of about 20 different European and Asiatic languages.

16. Station time allocations are made by Donald Lewis. He confines his programming interests to selecting time brokers and deciding the time periods and days during which a particular time broker's program will be broadcast. Lewis claims his objective is to try to serve as many different foreign language and ethnic groups as possible. To this end, WHBI(FM) schedules Spanish and Italian programs for the bulk of the midday hours Monday through Friday. Weekday evenings from 6:00 - 9:00 p.m. and Saturdays and Sundays are utilized primarily by time brokers who program in languages that are less prevalent in the New York area than Spanish and Italian. After 9:00 p.m. and through the night until 7:00 a.m., on weekdays, programming is primarily in English. The morning hours from 7:00 to 10:00 a.m., weekdays are devoted to English language religious programs. These programs are produced and broadcast by individuals and churches who pay for the broadcast time used.

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broadcasts, paid about $1,800 per week to the station. Generally, the rate charged by WHBI(FM) to a foreign language time broker came to about $80.00 per hour and the usual time purchase came to a block of 1/2 hour. Cosmopolitan refused to reveal costs reflected by the Form 324. Testimony indicates that WHBI(FM)'s operating costs are low.

17. Donald Lewis is not fluent in any language other than English. He does not involve himself in the programming produced and broadcast by individual time brokers whether English or foreign language. Time brokers have complete freedom over program content including such matters as news, editorials and commentaries. Foreign language time brokers are not required to submit translations of programs prior to broadcast nor does WHBI(FM) preaudition any program prior to its broadcast. Time brokers are free to sell time on their programs and with limited exceptions they do their own billing and retain the proceeds from any sales of time or commercial announcements within their time periods.[7a] Lewis tries to maintain a variety of programming by means of selection of time brokers. Lewis does not have to seek out foreign language time brokers. He is sought out by numerous individuals looking for time available for broadcast over his facility.

18. Donald Lewis says that his objective is to select time brokers with a view towards serving as many foreign language and ethnic groups as possible. He makes only a superficial investigation of prospective time brokers as to their past experience, character or other activities. He interviews prospective time brokers concerning their background, education and the programs they propose to present. From these interviews he decides if they are reputable people who can be expected to present a worthwhile broadcast service for their respective ethnic or language groups and abide by the rules of WHBI(FM) and the Commission.

19. Some examples of time brokers producing foreign language or ethnic programs on WHBI(FM) are:

[7a] In the case of WHBI(FM)'s afternoon Italian program, the producer preferred to be on the station payroll. His compensation came from sharing with WHBI(FM) the revenues from the commercials he sold—in effect, a commission salesman.

Emil Antonoff. Antonoff is the producer of a Bulgarian language program which has been on WHBI (FM) since 1964. He was a member of the Bulgarian Parliament when the Communists took control of Bulgaria in 1947 and, consequently, he spent two years in a concentration camp before escaping to the West. After coming to the United States in 1956, Antonoff worked for the Bulgarian National Committee and as a broadcaster for Radio Free Europe and the Voice of America. He is a major time broker buying over twenty hours per week from WHBI(FM). He also sub-brokers a good deal of this time to other foreign language time brokers.

Henry Landowski. Landowski, a professional journalist produced a Polish language program on WHBI(FM) from 1967 to 1970.

Helena DeRoche. DeRoche, a musician, poetess and artist, produced a Polish language program on WHBI (FM) from 1966 to 1970.

Ferenc Koreh. Koreh, the producer of a Hungarian language program which has been on WHBI(FM) since 1966, is a refugee from the Communist regime in Hungary. He has worked as a writer and editor for Radio Free Europe for nearly 20 years and he produced a Hungarian program on Station WBNX for 12 years prior to the time he began his program on WHBI(FM). He found the rates charged by WHBI(FM) to be much lower than WBNX.

Romas Kezys. Kezys, the producer of a Lithuanian language program which has been on WHBI(FM) since 1965 is a refugee from Communist Lithuania and a former member of the Supreme Committee for the Liberation of Lithuania. Kezys holds a masters degree in business administration from the City University of New York.

Maria (Tselas) Papadatos. Papadatos is the producer of Greek language programs which have been on WHBI (FM) since 1964. She is a poetess, novelist and the former publisher of a Greek language newspaper. In addition to producing programs on WHBI(FM), she produces Greek language programs for television stations in Newark and Philadelphia.

Alfred Rendeiro and Fernanda Santos. Rendeiro and Santos co-produce a Portuguese language program which has been on WHBI(FM) since 1964. Rendeiro is a university graduate and was a teacher in Portugal and Santos was formerly a professional actress and singer in Portugal.

Louis Adam and Gyula Apatini. Adam and Apatini produce a Hungarian program which has been on WHBI (FM) since 1967. Adam was a Hungarian Freedom Fighter during the 1956 revolution. After coming to the United States, Adam initiated a national newspaper and a nationally syndicated series of radio programs in the Hungarian language in order to promote continuing ties among his fellow countrymen and to provide a rallying point against the Communist regime in Hungary. Apatini is an architect and holds a law degree from a Hungarian university.

Harry McGuirk. McGuirk is the producer of an Irish program which has been on WHBI(FM) since 1966. He is an active leader in Irish-American political circles. He was the editor and publisher of the newspaper the *Irish-American News Review* until it was discontinued in 1970. In 1972 McGuirk was awarded a plaque by the Dublin Society of New York "in appreciation for his work in the cause of Irish freedom and the promotion of Irish culture in America."

Farouk Fenic. Fenic is the producer of a Turkish program which has been on WHBI(FM) since 1968. He is a professional journalist accredited to the United Nations

for Turkish newspapers. He also represents the Turkish National Airways in the United States.

Ghazi Khankan. Khankan is the producer of an Arabic program which has been on WHBI(FM) since 1966. He holds degrees in business administration and international relations. He is an insurance executive and writer and an active member of local and national Arabic social, religious and philanthropic organizations.

Mario Sessa. Sessa is the producer of one of WHBI (FM)'s Italian language programs. He was a journalist and the Commissioner of Police in his home town in Italy. Since coming to the United States, Sessa has worked as a journalist and radio commentator and served as Vice President of the Italian Press Association, U.S.A.

Ho Taik Ohm. Ho Taik Ohm is the producer of a Korean language program which began on WHBI(FM) in 1972. He is a leader of the local Korean community and the publisher of a Korean language newspaper. The host of Ohm's program, Kwang Jaw Lee, was formerly the chief radio announcer for the Korean government and has been a broadcaster for the Voice of America.

I. K. Asghar. Asghar is the producer of an Urdu language program which has been on WHBI(FM) since 1971. He is a magazine publisher and journalist. Before coming to the United States, Asghar was the Publicity Officer and Director of Community Development for the Government of Pakistan. Asghar is a member of one of the leading families of Pakistan. His father was the Secretary of State of British India and one of the principal political leaders of Pakistan at the time of partition.

Soichi Kato. Kato is the producer of a Japanese program which began on WHBI(FM) in 1972. He is a publisher, writer and public relations consultant.

Miro Gal. Gal is the producer of a Croation language program which has been on WHBI(FM) since 1968. He

is a graduate of universities in Paris and Zagreb and holds degrees in economics and business administration.

20. It is Donald Lewis' practice to meet with time brokers who utilize WHBI(FM)'s facilities for broadcast before the first time they go on the air. He does not necessarily meet with all time brokers. Those who buy time from brokers, the sub-brokers, may not meet with him at all. These sub-brokers deal principally with Emil Antonoff in the case of foreign language programming and Dean Lewis in the case of certain English language programming.

21. Donald Lewis, in his meetings with prospective time brokers, has a general discussion regarding the programming proposed by the particular individual. He reviews station regulations for them and copies of station regulations are provided to the time brokers, typed in English. These regulations deal with such subjects as the total number of commercials allowed; that a list of commercials must be submitted in advance of each broadcast; that the time broker must comply with the requirements of ASCAP and BMI regarding broadcast music; that sponsorship identification is required where consideration is received for mentioning any products; that written consent of WHBI(FM) must be obtained before the time broker sub-brokers any of his time; and that the written agreement entered into between WHBI(FM) and the time broker is subject to the Rules and Regulations of the Federal Communications Commission.

22. Donald Lewis and the prospective time broker meet together with a translator present on those occasions when the time broker is unable to understand the English language. Periodically, time brokers are provided with written instructions, always in English, dealing with such matters as: station identification requirements, personal attack rules, policies regarding length of

commercials and requirements with regard to rates for political spot announcements.

23. Emil Antonoff operates an enterprise called Balkan Echoes. He has a studio which provides facilities for producing and taping radio programs. Antonoff is a time broker who buys about twenty hours a week of broadcast time from WHBI(FM). Antonoff himself is not a citizen of the United States but is now in the process of acquiring such citizenship as a result of the changed political relationship between the United States and Communist Bloc countries. Antonoff has been a time broker since 1964 producing programs in various Central European languages. He has had an extremely satisfactory relationship with Donald Lewis and WHBI(FM).

24. Antonoff also acts as a principal in making blocks of time available to various individuals who broadcast in a number of European and Middle Eastern languages. These sub-brokers buy their time from Antonoff and use the facilities of his Balkan Echoes studios for production and taping.

25. Foreign language programs broadcast on WHBI (FM) are taped by the time broker and delivered to the station. These tapes are then played at the appropriate time period by whoever happens to be operating the station at the time.

26. WHBI(FM) maintains a master program log on plastic sheets ("Diazo"). Printed entries on these plastic sheets may be changed by erasure. The master log contains WHBI(FM)'s scheduled programs and the most recent commercials broadcast on these programs. The station's daily program logs are reproduced by running these plastic sheets through a "Diazo" process. Davis, Donald Lewis' secretary, is responsible for preparing the master logs and for duplicating these logs for daily use. Davis also is responsible for making changes in the master log. These changes are made on the basis of a com-

parison of the preceding week's broadcast log with the master log.

27. Beginning in 1969 all time brokers were required to submit, either prior to or at the time of broadcast, the names of sponsors of commercial and public service announcements to be broadcast by the time broker during his broadcast time. Emil Antonoff and Adolph Fermoselle, foreign language time brokers, were excepted from this requirement during the period of 1969 to 1972 and were allowed to submit their sponsor lists after broadcast of their programs. Antonoff submitted his list at the end of each week and Fermoselle an hour or two hours after his program was broadcast.

28. Upon receipt by WHBI(FM), the sponsor lists were compared with the information contained on the program log and corrections or deletions were made on the program logs by Davis. These changes were made prior to broadcast except for programs produced by Antonoff and Fermoselle. In the case of their programs, sponsor changes were made on the logs after broadcast. Changes in the case of Fermoselle and Antonoff were made by either Collins or Davis. After changes had been made in the program log, the sponsor list was stapled to the back of the program log and retained.

29. WHBI(FM)'s licensed operators are responsible for monitoring all English language programs at the time they are broadcast. As part of their duties they check off commercials when broadcast and make any necessary changes or deletions in the program log. WHBI(FM)'s operators are not fluent in any foreign language. Accordingly, their duties do not include the monitoring of foreign language programs. Thus, unlike English language programs, WHBI(FM)'s operators do not check off commercials or make changes in the program log during the broadcast of foreign language programs. Mon-

itoring of foreign language programs is performed by persons employed by WHBI(FM) on a fee basis.

30. WHBI(FM) obtains its foreign language monitors from various sources, including friends, organizations and other references. Frequently, it obtains names from the foreign language time brokers. In many instances the time broker knows the person monitoring his program. While monitors are normally recruited from listeners to WHBI(FM), there is no prohibition on a time broker also serving in that capacity. Antonoff, for example, monitors Yugoslavian, Macedonian, Croation and Serbian language programs. Time for these programs is purchased from Antonoff, and they are produced in Antonoff's studios. Lewis does not ask prospective monitors whether they are related to the time broker they are assigned to monitor, whether they have personal or business relations with the time broker, or whether they are an advertiser on the time broker's program. In many cases, Lewis' only contact with monitors prior to employment is by telephone.

31. Lillian Neves monitors two Portuguese language programs, Voice of Portugal carried on Sunday from 5:00 to 6:50 p. m. and Acquarello de Brazil carried Monday and Tuesday from 7:05 to 7:29 p.m. Neves was contacted for the job of program monitor by her brother-in-law, Alfred Rendeiro, who is one of the time brokers of Voice of Portugal. At the time Rendeiro suggested Neves to Lewis, Rendeiro asked Lewis if relatives could serve as monitors and Lewis stated he had no objection. Neves also is a social acquaintance of the time broker of Acquarello de Brazil and sees him at various social events held in the Portuguese community. Neves has discussed his program with him but doesn't think he knows that she monitors his program.

32. Adele Fermoselle, the wife of a time broker, monitors six Spanish language programs. She does not mon-

itor her husband's program. However, she personally knows some of the time brokers she monitors. Two, in particular, she sees socially since she, as well as they, are Argentinians. Her husband, who has a travel agency, advertises his agency on one of the programs which she monitors.

33. Monitors are required to sign a "Certificate of Qualifications" certifying to the country they were born and/or educated. WHBI(FM) does not require the prospective monitors to take any test to determine their proficiency in a foreign language. No particular educational standards are prescribed for monitors by WHBI(FM).

34. The "Certificate of Qualifications" is part of the packet which is sent to the monitor at the time of employment. The packet also includes a "Memorandum" describing the type of objectionable material which must be reported to the station. Such "objectionable material" includes statements which advocate the commission of a crime, words which are considered "dirty" ("bad words that polite people would never use"), words with "double" meaning, statements which contain "bad or insulting things about someone" "dead or alive," statements which criticize the way a person does his work (such as calling a doctor a "quack" or a "butcher"), or which say "bad things about a person, several people, a corporation, a product, or even a place or thing which would tend to hurt their reputation." The memorandum makes no reference to any Commission Rules, and evidently none of the monitors has direct knowledge of FCC Rules as to fairness, political broadcasts, personal attacks, lotteries, and others related to program content.

35. Monitors are required to complete a monitor report which calls for them to break down program content as to commercials, news, station identification, music, audience requests, interviews, religion, sports, social notes, education, political and other. In his report, the

monitor also certifies that commercial spot announcements heard conform to the list of commercials provided in advance of the program and to note any exceptions to the list which may be heard. In the monitor report there is also a representation that:

> "I found no vulgarisms, profanity, double entendre, or matters of questionable taste, nor have I found any material which would be classed as objectionable in regard to slander, incitement to riot, defamation of character, or dishonest advertising, as contained in the memorandum supplied to me dated August 14, 1967."

36. Donald Lewis makes up a list of programs to be monitored each month. Copies of the portion of the master log relating the time segment to be monitored by a particular individual are made. This portion of the log contains the name of the program, time of broadcast, and a list of sponsors. The log segment is stapled to a blank monitor report and mailed to the monitor about four weeks before the broadcast. The monitor is supposed to listen to the program on the radio at the time of broadcast and complete the monitor report. The completed report is returned to WHBI(FM). Most of the monitoring is done by the monitor at home. Monitors were paid $2.00 an hour until two years ago when the rate was raised to $3.00 an hour.

37. Foreign language programs which are broadcast daily are monitored once a week, and foreign language programs which are carried once a week are monitored once a month. In filling out his report the monitor merely checks whether or not a particular program category has been broadcast. It is up to the monitor to judge whether any objectionable material has been broadcast. Monitor reports are mainly used to determine if there have been any additions or changes in commercial announcements

actually broadcast when compared with what is listed on the log segment sent to the monitor.

38. Donald Lewis, or one of his employees, reviews the monitor reports and makes changes in the logs to conform to any changes indicated in the report. In some instances, monitor reports would be returned blank in that there would be no check marks indicating program content and no statements indicating changes in commercial sponsorship from those listed in the log excerpt. Such forms while filed and dated were accepted on the presumption that the monitor had actually listened to the program.

39. Over the years, WHBI(FM) has, from time-to-time, issued instructions calling upon time brokers to abide by requirements. These instructions have dealt with such matters as "Payola," illegal advertising practices, political broadcast, frequency and length of commercials, and others. These instructions, in English, would be posted at the studios of WHBI(FM).

40. Donald Lewis uses monitor reports to determine whether foreign language time brokers comply with the Rules and Regulations of the FCC and of WHBI(FM). From these monitoring reports, Donald Lewis seeks assurance that the time broker has not broadcast any profane or dishonest advertising and that the broker has kept within limits the amount of commercial time. Donald Lewis regularly listens to WHBI(FM)'s programs but he is not able to understand any of the foreign language programs. He is able, however, to recognize commercials and claims an ability to identify portions of programs which appear to be news or community announcements in a foreign language.

41. Emil Antonoff who programs a substantial block of time on WHBI(FM) is fluent in a number of languages and it is his practice to be present in his studio

whenever a program is being taped for broadcast. Antonoff continually monitors programs produced in his studios on an informal basis.

42. English language programs are monitored by WHBI(FM)'s operators while the programs are being broadcast. WHBI(FM)'s operators are instructed regarding rules and regulations which apply to programs broadcast and they are instructed to report to Donald Lewis should they hear anything broadcast in violation of the station's rules. According to Donald Lewis engineers employed by WHBI(FM) have authority to take programs off the air if they hear anything broadcast which they regard to be in violation of the station's rules.

43. Time brokers, including those whose programs are broadcast in English, are required to furnish lists of commercials with the tapes of their programs prior to broadcast. WHBI(FM) operators are instructed not to air programs unless sponsor lists are provided in advance. In addition to oral instruction regarding the rules which station operators are to enforce, these rules are reduced to writing and posted in the studio. Donald Lewis also monitors English language programs being broadcast on WHBI(FM). However, he does not monitor the station on any regularly scheduled basis.

44. Station operating personnel are instructed to listen for any broadcasts of information concerning contests or lotteries. They are also instructed to listen for any material which might be obscene or in bad taste and for any commercials not listed on a time brokers list of sponsors.

45. Any deviation from station rules which is heard by the operator is supposed to be reported by him to management, that is, either Donald Lewis or Allen Collins. According to testimony from station operators, some programming has been taken off the air on a few occasions

because of broadcast of unlogged commercials or because the material was in bad taste. While none of the operating personnel of WHBI(FM) are fluent in any foreign language, they do try to monitor foreign language programs to assure that the commercials broadcast are consistent with the program log and sponsor lists furnished by the time broker.

46. Since the latter part of 1968, WHBI(FM) broadcast an English language program called "Kaleidoscope." This program was broadcast during the early morning hours between 3:00 and 6:00 a.m., Monday through Friday and from 2:00 to 3:00 a.m., on weekends. "Kaleidoscope" is still broadcast and was most recently aired from 4:00 to 6:00 a.m., weekdays and 2:00 to 3:00 a.m., on weekends.

47. "Kaleidoscope" has been a program broadcast on behalf of various entities in which the principal owner is Dean Lewis. Dean Lewis is not related to Donald Lewis, the owner of WHBI(FM). At first "Kaleidoscope" time was purchased by Radio Broadcast Associates, an entity which consisted of Dean Lewis and Stewart and Edith Marshall. RBA went into bankruptcy in June 1971 but "Kaleidoscope" continued without interruption. "Kaleidoscope," with the termination of RBA, continued under the control of Radio Communications Consultants, an organization in which Dean Lewis was the sole principal. Sometime in the fall of 1972 the name of Radio Communications Consultants was changed to Media Company of America, an organization in which Dean Lewis was the sole principal.

48. Dean Lewis through his various named enterprises purchased time from WHBI(FM) at rates which varied from $15.00 to $30.00 per hour. This time was then resold by Dean Lewis' various enterprises to individuals desiring to become involved in broadcasting. In essence,

"Kaleidoscope" consisted of individual programs varying in length from five minutes to sixty minutes each. These individual programs would feature music or discussions dealing with a variety of subjects. Individual programs were produced by persons who purchased the time from Dean Lewis.

49. As many as seventy different individuals would produce and broadcast programs on "Kaleidoscope" in the course of each week. In each case, the individual who produced the program was responsible for the music or other material used. Each individual was entitled to sell commercials during his time segment and, if he did, it was up to him to bill and collect for these commercials.

50. Most of those who produced programs on "Kaleidoscope" were solicited through newspaper advertising which appeared usually in the *New York Daily News*. In its advertising, RBA or its successor companies would represent that there was a need for program producers and disc jockeys to produce shows on a New York radio station. This advertising represented that experience was unnecessary and that training would be provided. The prospect of earnings from $10,000 to $12,000 per year was held out and there were representations that the broadcasting company would pay for training; that the work would be full time or part time; and that the prospect would be able to host his own radio show while in training. While the prospect of earnings was held out in the advertising there was nothing to indicate that the prospect would have to pay anything for training.

51. Dean Lewis operates what he describes as a training program. In return for fees paid by the prospects who respond to his advertising, training and other services are provided to them. Donald Lewis knew about Dean Lewis' method of operation and he knew of the newspaper advertising that Dean Lewis' enterprises were

running. Dean Lewis operated in Jersey City, New Jersey, and the prospects who responded to his advertising would pay for broadcast time on "Kaleidoscope" made available to them. Each such person was charged on the order of $25.00 for a five-minute period. This charge could vary from $15.00 to $40.00 depending upon frequency. Each individual who contracted for five-minute time slots on WHBI(FM) through Dean Lewis was free to determine the type of programming to be broadcast. Dean Lewis provided facilities for cutting tapes used for these broadcasts. Prospects who answered Dean Lewis' advertisement would be charged an audition fee of $15.00 and if they went ahead to cut a pilot tape they would be charged $25.00 for that service.

52. Although Donald Lewis was generally aware of the manner in which RBA and the other enterprises did business, he did not himself deal with Dean Lewis regarding "Kaleidoscope." This responsibility was turned over to his lawyer, Gilbert Siegal. Donald Lewis brought to Siegal's attention an advertisement which appeared in the *New York Daily News* on April 21, 1969. This advertisement called for announcers and disc jockeys to produce and host radio shows for a New York radio station and a national network. This advertisement represented "earnings up to $15.00 an hour" and said that no experience was necessary; —the broadcast company would train.

53. After reading the ad, Siegal wrote a letter to Dean Lewis asking for a written description of RBA operations and expressing concern regarding possible violation of the New Jersey educational law and the competence of the individuals who might broadcast over WHBI(FM). Dean Lewis responded to Siegal's letter by telling him that RBA sub-contracted time segments to others who were permitted to obtain sponsors to defray the costs or to bear the cost of time and production charges them-

selves. He said that RBA was not required to register under the New Jersey registration law since it did not provide a "training program." Dean Lewis told Siegal that RBA's business consisted of making broadcast time available and providing facilities for using such broadcast time. According to Dean Lewis the competence of individuals who produced programs for "Kaleidoscope" was determined by written tests and studio auditions and ultimately by Dean Lewis who listened to their tapes before they were put on the air.

54. In addition to newspaper advertising, RBA also had spot announcements which were broadcast on "Kaleidoscope." Program logs for WHBI(FM) show that commercials for RBA were broadcast during the "Kaleidoscope" show at various times during 1969. Donald Lewis never heard any of the commercials for RBA nor did he discuss these commercials in any detail with Dean Lewis. The only discussion of RBA commercials broadcast on WHBI(FM) was related to a request by Dean Lewis to use the WHBI(FM) telephone number in the commercials. Most of the commercials were on tape provided in advance of broadcast although there were some live commercials broadcast by the station operator on duty.

55. Donald Lewis was unable to provide any transcript of a commercial as it was actually broadcast over the air. He did provide tapes of RBA commercials but there was no one who could testify that these particular tapes were actually broadcast. However, Dean Lewis after viewing transcripts of these tapes, recognized the material as spot announcements prepared for the purpose of broadcast on behalf of RBA. These taped commercials were similar in content and the following is the verbatim text of one:

"2 Mins. 15 sec. (135 sec)"

Anns: Dean Lewis

(start)

"Hi, this is Dean Lewis the Executive Producer for Kaleidoscope. I am on location right now recording one of the many Kaleidoscope remote broadcasts and it certainly is an exciting event with thousands of people in attendance here, and I want to take this moment out to talk to you about perhaps an even more exciting event, an opportunity to broadcast your own radio show right here on WHBI-FM. Have you have ever wonder what it would be like to be the Disc-Jockey on your own weekly radio show. It sounds exciting doesn't it. It certainly is an exciting career opportunity. It is an oppoprtunity of a life time. Many openings are now available for beginners to break into radio, right here on this New York FM station. Just imagine hosting your own weekly Disc-Jockey show, sports program, or interview program, or even a weekly show that you create yourself. No experience is necessary, but you should have a fairly good speaking voice and plenty of enthusiasm. Shows can be done on a part time basis also, so you may even continue with school or your present job. For details take this telephone number down, in New York call 873-1400, that's 873-1400. If you have ever said to yourself, I'd like a career in broadcasting, now is your big chance. People of all ages, male and female, will be auditioned. And remember this is not a school, but an opportunity to broadcast your own weekly radio show right here as part of Kaleidoscope. Also remember that no experience is necessary. Persons with their own programming ideas will receive careful consideration. That phone number once again in New York, for information, is 873-1400, that's

873-1400. For complete information and details call that telephone number right now, and if the line is tied up please hang up dial again and keep trying to get through. 873-1400. Thank you. (end.)"
873-1400 is WHBI(FM)'s telephone number.

56. Donald Lewis gave RBA permission to display WHBI(FM)'s call letters at its studio in Jersey City. These call letters were taken down when the studio was redecorated in August 1969. After an informal inquiry by a Commission investigator regarding the display of WHBI(FM)'s call letters at the RBA studio, Donald Lewis withdrew his permission and the station call letters were not displayed.

57. In the summer of 1969, Donald Lewis received a call from a detective in the Jersey City Police Department who told him that a complaint had been filed against RBA. A meeting was arranged with the complainant but the complainant did not show up. Donald Lewis obtained the name and address of the complainant and tried unsuccessfully to reach him by telephone. Donald Lewis also received one or two phone calls from people who complained about paying $15.00 to Dean Lewis for an audition fee. Donald Lewis called Dean Lewis about these complaints and Dean Lewis agreed to refund the audition fees.

58. In late September or early October 1970 Allen Collins, the WHBI(FM) station manager, was called two or three times by a Federal Trade Commission investigator named Ferrogari who said he was checking out complaints concerning RBA's operation. Collins told Donald Lewis about these phone calls and that Ferrogari wished to speak to Lewis. On October 7, 1970, Donald Lewis called Ferrogari, who told Lewis he was conducting an investigation of RBA. Lewis recalls that Ferrogari asked him whether he considered the RBA operation to be in accordance with the law. Lewis also recalls that

he was asked various other questions about RBA, but doesn't remember the details. Donald Lewis believes he called Dean Lewis following his conversation with Ferrogari but doesn't remember the details of that conversation either. Donald Lewis took no other steps, at that time, regarding RBA's operation.

59. Donald Lewis was notified by Dean Lewis in January 1972 that the Federal Trade Commission had issued a formal complaint against RBA and that RBA was contemplating entering into a consent decree. Donald Lewis contacted Siegal on January 20, 1972, and told him of these developments. Siegal called Dean Lewis who told him that in February 1971 RBA had been informed by the Federal Trade Commission that it was using misleading ads. Siegal asked for and was given copies of the documents served by the Federal Trade Commission on RBA.

60. The documents included the following: A letter dated March 16, 1971 from the Federal Trade Commission to RBA informing Dean Lewis that a formal investigation was being conducted to determine if RBA had violated Section 5 of the Federal Trade Commission Act; a complaint charging that RBA's newspaper advertisements misrepresented facts concerning the nature of RBA's business, i.e., that the advertisements were offers of employment opportunity when, in fact, they were designed to attract members of the public for the purpose of obtaining prospective purchasers of RBA's services; that the earnings projections made are the average earnings of sub-brokers when, in fact, they are far in excess of such average earnings; that the advertisements were placed by a radio station when, in fact, RBA does not operate a licensed radio station; that radio shows are broadcast from coast to coast and are distributed for syndication when, in fact, such shows are not broadcast from coast to coast and are not syndicated on a regular

basis; and, an "Agreement Containing Consent Order to Cease and Desist" from the enumerated advertising practices. RBA agreed in the consent order that it would cease and desist from misrepresenting that employment is being offered; that the radio shows are to be broadcast over a network or distributed for syndication; and that earnings or profits may reasonably be expected by subbrokers of RBA. This "Agreement" was signed by RBA in June 1971 and officially issued by the Federal Trade Commission's staff on August 16, 1971. The Federal Trade Commission issued its decision on February 23, 1972 accepting the executed consent agreement, and this decision became final on March 30, 1972.

61. Siegal had discussions with Dean Lewis and his attorney. Siegal wanted confirmation that Dean Lewis would abide by the terms of the consent order. In a letter dated March 30, 1972, Dean Lewis advised Siegal that the improper practices alleged by the Federal Trade Commission against RBA were not being engaged in by RCC, the successor corporation to RBA. On the basis of Dean Lewis' assurance, Siegal advised Donald Lewis to allow Dean Lewis to continue to buy time over WHBI (FM).

62. Siegal called Dean Lewis sometime in October or November 1972. He was told by Dean Lewis that RCC was having minor problems with the wording in their ads and some of their brochure material which was being worked out with the Federal Trade Commission staff. Dean Lewis assured Siegal that he was not in any trouble and that no further enforcement action had been taken by the Federal Trade Commission. Siegal continued to maintain contact with Dean Lewis to assure that there was compliance with the Federal Trade Commission consent order.

63. Two witnesses who had actually entered into contracts with RBA to produce programs broadcast as part

of "Kaleidoscope" appeared and testified. One of these was Kerry Goonan and the other James T. McGiveney. McGiveney learned about RBA through a commercial which he heard on WHBI(FM) and Goonan learned about RBA through an advertisement which he saw in the *New York Daily News*.

64. Goonan called the telephone number listed in the newspaper advertisement and was given an appointment to come to the RBA studios in Jersey City for an interview. At the interview, he was given a description of RBA operations, its audition procedures and its contract policy by Dean Lewis and his assistant. He was also given a copy of the "Kaleidoscope program bulletin." He filled out an application to become a producer on "Kaleidoscope" and he was given an audition. At this time he paid a $15.00 deposit refundable if his application were to be turned down.

65. After this audition and initial interview, Goonan was invited back to RBA studios to produce a pilot program. He was charged $45.00 for producing the pilot tape. After completing the "pilot," Goonan was invited back to discuss signing a contract. He was given a copy of an uncompleted contract form to study. After a week's time, he decided to sign a contract and he went back to the RBA studios. At that time the blanks in the contract form were filled out in Goonan's presence. These items included the fact that Goonan's program would be broadcast at 5:00 a.m., and that Goonan was obligating himself to produce twenty-six "Kaleidoscope" programs.

66. Goonan claims that his understanding was that his program was to be broadcast at 5:30 p.m. He tried to sell commercial spots for his program but limited his solicitation to his brother who operated a small business and the New York Telephone Company, his employer. Goonan was unsuccessful in obtaining sponsors.

67. Goonan was entitled to attend training school according to a schedule which he was given at the time he negotiated his contract. He attended some of the scheduled night classes but did not attend any Saturday sessions which were designed to qualify him for a Federal Communications Commission license. After completing taping of thirteen programs to be broadcast on "Kaleidoscope." Goonan asked to be released from his obligation to produce the remaining thirteen programs.

68. Goonan was told that if he decided not to go though with the contract he would be obligated to pay an additional $25.00 each for the cost of production of the thirteen programs he had already produced. Goonan completed his contract and did not renew it.

69. He claimed that he had been told that it would not be difficult to obtain sponsors for his programs and that in signing the contract he did not understand that the broadcasts were to be during the early morning hours. It was his impression that his program would be broadcast in the evening. Indeed, he gathered his friends in a tavern to listen to his opening broadcast which he expected to hear at 5:30 p.m. He was evidently disappointed with his experience with RBA.

70. McGiveney's experience was not the same as Goonan's. He was satisfied. McGiveney entered into a contract with RBA to purchase thirteen, five-minute segments, at $30.00 a period. At the end of the first thirteen-week period, McGiveney renewed his contract for an additional thirteen week period.

71. McGiveney heard about RBA through a commercial broadcast over WHBI(FM) during the "Kaleidoscope" program. He called the telephone number given in the commercial and was given an appointment for an audition. McGiveney went to RBA's offices in Jersey City, New Jersey, in May of 1969 for his audition and was

given an application to complete and was then taken into a studio where he completed an audition tape for which he paid a fee of $15.00. Subsequent to taking the audition, McGiveney was contacted by RBA and invited to return to RBA's offices to do a fifteen-minute "test show" which was broadcast over WHBI(FM). Before McGiveney did the test program, he and a number of other applicants who had already taken auditions and who had come to RBA's studios to do pilot shows were advised by Dean Lewis that there would be a $25.00 charge for the pilot program to cover part of the program's production costs.

72. After completing his pilot program, McGiveney entered into a contract with RBA to produce thirteen five-minute "Kaleidoscope" programs and to pay RBA $30.00 for each program. He discussed the contract with Dean Lewis and Stewart Marshall (Lewis' consultant) who explained to him what the contract entailed and what the costs to him would be. Dean Lewis suggested that he start by doing only a five-minute program. McGiveney entered into the contract with RBA on his own volition, not in the belief that he would earn substantial revenue from doing the program, but because he regarded the contract as providing an opportunity for him to gain experience and get a start in broadcasting.

73. McGiveney was entitled to sell commercials in his program and to keep whatever revenues he realized from the sale of commercials. Although he received instructions from Dean Lewis and other RBA employees concerning how to go about selling time, he did not make much of an effort to sell commercials. During the twenty-six weeks McGiveney was under contract with RBA he was entitled to attend classes every Tuesday evening which lasted for approximately an hour. These classes covered many subjects related to broadcasting such as how to handle a radio control board, how to obtain an

FCC license, and various aspects of the FCC's Rules and Regulations. McGiveney paid an aggregate of $845.00 for twenty-six broadcast training sessions and twenty-six radio programs.[8]

74. "Kaleidoscope" the early morning program carried over WHBI(FM), has at all times been the product of entities in which Dean Lewis was the principal. Time for "Kaleidoscope" was originally purchased by Radio Broadcast Associates and continued under the aegis of RBA until June 1971 when RBA was declared bankrupt. RBA's bankruptcy did not terminate "Kaleidoscope." "Kaleidoscope" continued without interuption. From June 1971 the program was under the aegis of Radio Communications Consultant, an organization in which Dean Lewis was the sole principal.

75. Although RCC began to operate over WHBI(FM) in June 1971, its time agreement with Cosmopolitan Broadcasting was not filed with the Commission until November 1, 1971. Donald Lewis conceded that the agreement with RCC was not reduced to writing nor filed with the Commission until after November 1, 1971. He attributed this delay to the confusion which arose during the intervening period as a consequence of the bankruptcy involving Dean Lewis' prior corporate entity, RBA. Thus, although RCC assumed the responsibility for paying for "Kaleidoscope's" time in June 1971, it was not until sometime in the fall that RCC entered into a written agreement reflecting its responsibility for the "Kaleidoscope" broadcasts. This delay came about because of uncertainties involved in the bankruptcy proceeding including the need to complete that proceeding so that the equipment of the bankrupt corporation could

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[8] McGiveney works in the stock room of a large New York department store. According to his testimony he did not finish high school.

be transfered to Dean Lewis' new corporate enterprise, RCC.

76. Once RCC had formally succeeded to RBA's status as the time broker for "Kaleidoscope," it also began to execute sub-brokerage agreements and these agreements in turn were filed with the Commission by WHBI(FM). This did not begin until after November 1, 1971. Fourteen of these sub-brokerage agreements showed on their face that they had been entered into prior to November 1, 1971. However, they were not filed with the Commission until after November 1, 1971. These contracts were back dated to reflect the actual date the sub-broker had begun broadcasting and it was not Donald Lewis' intent to mislead the Commission. These agreements had not been reported to WHBI(FM) by Dean Lewis as a result of the confusion caused by the circumstances of RBA's bankruptcy and RCC's succession to RBA's interests. The fact that these agreements had not been reported to WHBI(FM) was discovered by Donald Lewis as a result of cross checking the names of brokers who had begun their operations under RBA and continued to operate after RCC had taken over.

77. WHBI(FM)'s relationship with "Kaleidoscope" was complicated by the fact that some of the performers who appeared on "Kaleidoscope" sold commercials during the time periods that they performed and others did not sell commercials. Those who sold commercials were permitted to retain the proceeds of the commercial time and thereby they became time brokers. WHBI(FM) periodically checked the program logs for "Kaleidoscope" to assure that all performers on that program who did have commercials had agreements filed with WHBI(FM).

78. In the event that a performer on "Kaleidoscope" sold commercials, he was required to sign a sub-brokerage contract which was dated as of his first broadcast rather than the date upon which his first commercial was broad-

cast. As a consequence of RBA's bankruptcy a number of agreements were not timely filed by the "Kaleidoscope" time brokers. When WHBI(FM) did file these agreements with the Commission, they were late.

79. During 1971 and 1972, there were twenty-four contracts entered into with time brokers and Cosmopolitan Broadcasting Company which were filed late with the Commission. These contracts were:

	Date of Time Brokerage Contract	Date of First Broadcast	Date Contract Received by FCC
Jefferey Smith	5/04/72	5/14/72	10/16/72
Ted Maksymowicz	8/01/69	8/01/69	10/13/72
W. J. Morris	8/15/72	8/17/72	10/13/72
A & H Productions (E. Antonoff)	9/12/69	10/01/69	5/26/71
Ray Wilson	1/04/71	1/04/71	5/26/71
Mario Gittens	9/22/72	10/01/72	10/31/72
Korean Broadcasting of N.Y., Andrew Ohm	10/10/72	10/12/72	11/17/72
William Cady	9/12/72	9/14/72	10/24/72
Tony Romeo	4/03/72	4/03/72	7/10/72
I. K. Asghar	7/14/72	7/17/72	8/28/72
Nick Signorello	4/03/72	4/08/72	7/18/72
Enzo DeLuca	4/03/72	4/03/72	7/18/72
Salvatore Palmeri	4/03/72	4/03/72	7/18/72
Tommaso Salomone	4/03/72	4/03/72	7/18/72
Joe Valente	4/03/72	4/03/72	7/18/72
Antonio Piraino	4/03/72	4/03/72	6/30/72
John Greco	5/01/72	4/29/72	6/09/72
Muriel Fleit	3/26/72	3/21/72	6/09/72
Sal Mondrone	4/28/72	4/30/72	6/09/72
Renato Morffi	4/07/72	4/09/72	5/30/72
Gary Greenberg	4/21/72	4/24/72	5/30/72
Ed. Clooney	3/14/72	3/31/72	5/05/72
Gary Greenberg	2/17/72	3/01/72	5/05/72
Fernando L. Gonzalez	7/31/72	7/31/72	9/18/72

80. In the case of some of these agreements the failure to file on time was explained as an oversight and in other instances the late filing came about as a result of a practice of accumulating individual contracts to be filed in a group so as to save paper work. Some of the

contracts which had been filed late and which are included in the above list involved renewal of contracts which had expired. Cosmopolitan's mode of operating WHBI(FM) resulted in a multiplicity of individual contracts with time brokers and the multiplitiey of contracts between time brokers who in turn sold portions of their time to other brokers.

81. Cosmopolitan has entered into more than 700 contracts with time brokers since WHBI(FM) went on the air. Cosmopolitan spent quite a bit of time in obtaining, executing and signing contracts which it entered into with time brokers who used its station facilities. Its task was vastly complicated by the large number of time brokers involved and further by the considerable number of sub-brokers to whom WHBI(FM)'s time brokers sold time.

82. It was stipulated by the parties that during the months of October and November 1970, the following political announcements broadcast on WHBI(FM) were not entered on WHBI(FM)'s program logs:

Candidate	Date	Time
Lefkowitz	10/21/70	3:15 p.m.
Lowenstein	10/22/70	3:15 p.m.
Rockefeller (2 announcements)	10/22/70	5:30 p.m.
Farber	10/23/70	3:00 p.m.
Lefkowitz	10/23/70	3:00 p.m.
Powell	10/24/70	4:00 p.m.
Ottinger	10/28/70	3:15 p.m.
Caso	10/29/70	3:15 p.m.
Leone	10/30/70	3:15 p.m.
Crispiano	11/03/70	1:45 p.m.

83. WHBI(FM)'s program logs for the months of October and November 1970, disclose that the following political announcements were listed without an entry identifying the name of the person or organization paying for the announcements:

Candidate	Date	Time
Nelson Gross	10/07/70	1:59 p.m.
Nelson Gross	10/10/70	11:45 p.m.
Leone	10/15/70	5:00 p.m.
Gross	10/17/70	1:30 p.m.
James Buckley	10/17/70	2:15 p.m.
Buckley	10/18/70	7:15 p.m.
V. Powell	10/21/70	6:15 a.m.
Jerry Crispiano	10/23/70	11:15 a.m.
Gross	10/24/70	11:30 a.m.
Rockefeller	10/28/70	12:45 a.m.
Crispiano	10/28/70	1:45 p.m.
John Rooney	10/28/70	2:30 p.m.
Rooney	10/29/70	2:45 p.m.
D'Angelo	10/29/70	2:30 p.m.
Crispiano	10/29/70	3:00 p.m.
Veronica Powell	10/30/70	1:30 a.m.
Leone	10/30/70	11:45 a.m.
Rockefeller	10/30/70	12:30 p.m.
Rockefeller	10/30/70	12:45 p.m.
Rockefeller	10/30/70	1:15 p.m.
Crispiano	10/30/70	1:59 p.m.
Leone	10/30/70	2:00 p.m.
Leone	10/30/70	2:15 p.m.
Rooney	10/30/70	2:45 p.m.
Gross	10/31/70	11:45 a.m.
Buckley	10/02/70	1:05 a.m.
Rockefeller Campaign Song	10/17/70	10:15 a.m.

84. During the months of October and November 1970, WHBI(FM) broadcast political announcements for the following candidates without indicating on the station's program logs the program type:

Candidate	Date	Time
Rockefeller	10/03/70	5:30 p.m.
Rockefeller	10/04/70	10:00 a.m.
Nelson Gross	10/10/70	11:45 a.m.
Rockefeller	10/17/70	5:45 p.m.
Jerry Crispiano	10/23/70	11:15 a.m.
Nelson Gross	10/24/70	11:30 a.m.
Leone	10/30/70	5:00 p.m.
Rockefeller	10/31/70	5:30 p.m.
Buckley	11/02/70	1:05 a.m.

85. Investigators from the FCC requested the station's political broadcast files during a visit to Cosmopolitan's offices at 80 Riverside Drive in New York City on May 8, 1971. The file which was shown to the investigators consisted of accounts receivable receipts showing sales of political broadcast time by WHBI(FM) and by two of its Italian language broadcasters. Also shown were the charges made for these sales of political time. Also included in the file were some foreign language copy of various political announcements broadcast by WHBI(FM) and some contracts for sale of political time executed by WHBI(FM) and by Nino Vellassai. Vellassai's arrangement with WHBI(FM) called for him to receive 50% of the proceeds from the sales of commercial time on his program.

86. WHBI(FM)'s political file did not contain any lists of requests for political time showing the disposition made of such requests nor did it have lists of the officers or principals of political groups sponsoring political announcements broadcast over WHBI(FM). Donald Lewis admitted that until he was visited by FCC investigators in 1970, he was not aware of the particular requirements that he keep a record of the political entities sponsoring anouncements broadcast over WHBI (FM). Following the visit by Commission investigators, he instructed his personnel to keep such records.

87. According to Donald Lewis there was no list of requests for political time because all such requests had resulted in sales of time and were, therefore, recorded in the station's records. WHBI(FM)'s time brokers were not instructed to maintain lists of requests but their testimony was to the effect that they either did not get such requests or that all such requests were fulfilled with sales of time. Time brokers were eventually instructed to report such requests to WHBI(FM).

88. On July 7, 1969, Donald Lewis wrote a letter to the Commission giving information concerning the rates

which WHBI(FM) charged candidates using its facilities. Donald Lewis explained that WHBI(FM) presents foreign language programming for diverse foreign language groups produced by independent time brokers. Nearly all of WHBI(FM)'s advertising is sold by these time brokers to small businessmen who speak the languages in which the programs are presented and who wish to reach that portion of WHBI(FM)'s audience which includes persons of their own ethnic background. Donald Lewis further explained that as a result of various factors, such as the time periods in which time brokers present their programs and the popularity of the time brokers themselves, the different brokers charge different rates for advertising on their programs. Prior to 1971, WHBI(FM)'s time brokers were instructed that they were free to charge advertisers whatever rates they could get for time in their respective programs, provided that they did not charge political advertisers higher rates than they were charging commercial advertisers for announcements of the same duration.

89. WHBI(FM)'s standard rate for commercial announcements broadcast in time controlled by the station is $10.00 per minute during the hours from 6:00 a.m. until 6:00 p.m. and $15.00 per minute during the hours 6:00 p.m. until midnight. The rate for station controlled time between midnight and 6:00 a.m. is $5.00 per minute. These rates for station controlled time have been in effect since prior to 1970. Cosmopolitan has on occasions sold commercials at rates higher than these stated rates and it has also sold commercials at rates lower than the stated rate to advertisers purchasing package plans or multiple insertions. Cosmopolitan makes no effort to sell station break commercials and since little of the time is actually sold it is used primarily for public service announcements.

90. In 1971, Donald Lewis set a standard rate of $5.00 per minute which all producers were required to

charge for political advertising even though they may have been charging a substantially higher rate for commercial advertising. By letter dated January 13, 1972 Donald Lewis advised the Commission that Cosmopolitan had established a uniform rate of $5.00 per minute for all political advertising on WHBI(FM).

91. A ledger sheet obtained from WHBI(FM)'s political file showed that during October, 1970, Joseph Valenti sold time in his program to the Federation of Italian American Democratic Organizations for thirty-four political announcements on behalf of ten different candidates. The announcements were all at a rate of $10.00 per minute and were on behalf of candidates affiliated with both the Republican and Democratic parties. Valenti's charges for these political announcements included production costs since he personally translated the announcements into Italian, edited them, recorded them and provided other production services.

92. During October, 1970, Valenti charged commercial advertisers rates which ranged from a low of $5.00 per minute to a high of $12.00 per minute. Ingman Brothers and Lamanto Laboratories were two commerical advertisers whom Valenti charged a total of $10.00 each for two thirty-second commercials included in his program during October, 1970. Valenti charged Zummo Theatrical Enterprises $12.00 for sixty-second commercials included in his program during October, 1970. Valenti did not provide any production services on behalf of either Zummo Theatrical or Lamanto Laboratories such as those he provided in connection with political advertising for the Federation of Italian American Democratic Organizations.

93. A ledger sheet obtained from WHBI(FM)'s political files showed that during October, 1970, Maria Iannella sold the Columbian Coalition for Rockefeller six ten-minute programs and two fifteen-minute programs

on behalf of Governor Rockefeller's reelection at the rate of $40.00 per program and $100.00 per program, respectively, and that she also sold the Columbian Coalition fourteen one-minute station break announcements on behalf of Governor Rockefeller at a rate of $10.00 per announcement. The $140.00 which Iannella received from the Columbian Coalition for the fourteen station break anouncements was paid over to the station because the payments were received for announcements broadcast in station time. Ianella received an additional $10.00 for each of the announcements in consideration of the professional services she provided by writing the script and producing the commercials.

94. A ledger sheet and contract obtained from WHBI (FM)'s political files showed that, during October-November, 1970, the Arts and Entertainment Committee of the Friends of Rockefeller Team paid $15.00 each for twenty-one one-minute political announcements on behalf of Governor Rockefeller which were broadcast in the "Nino D'Auria Show." Nino D'Auria was unavailable to testify (he died approximately one year before the start of the hearing). Bureau counsel and counsel for Cosmopolitan entered into a stipulation. Based upon a review of the commercial ledger sheets in connection with the Nino D'Auria Show and WHBI(FM)'s program logs, it was stipulated that the unit rate for sixty-second commercial announcements in the Nino D'Auria program during October, 1970, varied from a low of $4.00 per announcement for commercials on behalf of Alleva Dairy and Roma Furniture to a high of $23.88 per announcement for commercials on behalf of Gemma Oil.

95. A ledger sheet obtained from WHBI(FM)'s political files showed that during October, 1970, the Friends of Rockefeller of Roumanian Descent paid $25.00 for each of four two-minute commercial announcements broadcast during Balkan Echoes programs. The Balkan

Echoes studios did not bill the Friends of Rockefeller of Roumanian Descent for these four political announcements but $100.00 was donated to Emil Antonoff for his Bulgarian program. These announcements were actually broadcast in the Greek program of Maria Papadatos which is produced at the Balkan Echoes studios. During October, 1970, Papadatos charged commercial advertisers up to $25.00 per minute for announcements in her program.

96. Ledger sheets and orders obtained from WHBI (FM)'s political files showed that during October and November, 1970, Nino Bellassai charged the Columbian Coalition for Rockefeller $17.50 for each of ten political announcements on behalf of Governor Rockefeller broadcast during his program. The rates which Bellassai charged commercial advertisers for announcements in his program during the summer and fall of 1970 varied over a wide range with some advertisers being charged as little as $5.00 per announcement while other advertisers were being charged as much as $17.50 per announcement, the same rate which Bellassai charged the Columbian Coalition for Rockefeller and Nelson Gross, a New Jersey gubernatorial candidate, for one-minute political announcements.

97. During October and November, 1970, fourteen one-minute political announcements were broadcast over WHBI(FM) on behalf of Governor Rockefeller during daytime station breaks and the committee sponsoring the announcements was charged $10.00 for each announcement. Maria Iannella confirmed that the fourteen political announcements for Governor Rockefeller were, in fact, broadcast during time controlled by WHBI(FM) and not in time which she purchased from Cosmopolitan; that the rate for the announcements was $10.00 per minute; and that the proceeds from the sale of the announcements were remitted by her to WHBI(FM). Between October

26 and October 30, 1970, WHBI(FM) also broadcast one-minute political announcements during daytime station breaks. WHBI(FM) was paid $10.00 for each of these announcements.

98. Cosmopolitan sold time for one-minute daytime station break commercial announcements broadcast during October, 1970, for as little as $5.00 per announcement but Cosmopolitan also charged $15.00 for one-minute daytime station break commercial announcements broadcast during October, 1970. The $15.00 per minute rate was charged Promotional Services, Inc., for a schedule of sixty-six one-minute commercial announcements for Zenith which were sold on a two-for-one trade-out basis where each announcement was valued at $15.00. One of the Zenith commercials covered by the contract with Promotional Services, Inc., was broadcast on October 16, 1970, at a daytime station break. Nino Bellassai, a WHBI (FM) commission salesman, sold two daytime station break announcements which ran in November, 1970, at a rate of $10.00 per announcement, the rate charged all political candidates purchasing station break time on WHBI(FM) during 1970.

99. WHBI(FM)'s program logs for the month of October, 1970, contain entries for at least 228 political announcements, and, in fifty-seven of these 228 listed announcements, the political affiliation of the candidate is not shown. The WHBI(FM) program logs for the first three days of November, 1970, contain entries for at least forty-two political announcements and in thirteen of these listed announcements the political affiliation of the candidate is not shown. The failures to log political affiliations involved announcements for ten different candidates. During the months of October and November, 1970, WHBI(FM) broadcast eleven political announcements which were not entered on its program logs. During the same period the station broadcast at least 270 po-

litical announcements which were logged. Of the 270 political announcements listed on WHBI(FM)'s program logs for the months of October and November, 1970, twenty-seven were listed without the person or organization that paid for the announcement being identified. Of the 270 political announcements listed on WHBI(FM)'s program logs for the months of October and November, 1970, nine were listed without an entry having been made on the logs to identify the announcement by type. Thus, 261 political announcements broadcast were identified by type.

100. WHBI(FM)'s program logs are prepared using a "diazo" sheet, a plastic rectangle, from which the logs are printed. The "diazo" is prepared by Sandra Davis who adds commercials to the "diazo" or deletes them as she is advised of changes in the commercials in the programs of WHBI(FM)'s various time brokers. Since 1969, the basic log prepared from the "diazo" has been supplemented by sponsor lists which WHBI(FM)'s time brokers are required to furnish to the station prior to, or at the time of broadcast. The information contained in the sponsor lists submitted to the station is compared with the basic log by the engineer on duty at the time of, or prior to, broadcast and the engineer makes any corrections on the basic log which are indicated by the sponsor lists. If the sponsor lists are received sufficiently in advance of broadcast, Davis will sometimes conform WHBI (FM)'s logs with the sponsor lists prior to broadcast.

101. From 1969 until approximately a year before the hearing in this case, two time brokers, Emil Antonoff and Adolfo Fermoselle, were permitted to bring their sponsor lists to the station subsequent to broadcast. During the period when Antonoff's sponsor lists were received after the broadcast of his programs, they were reviewed by WHBI(FM)'s general manager, Alan Collins, who made any changes that were required on the basic

WHBI(FM) program log and then stapled the sponsor lists to the log. During the period Antonoff was submitting his sponsor lists subsequent to broadcast, Davis would often receive pre-broadcast telephone calls from Antonoff regarding changes in the commercials in his programs; however, if she discovered upon review of Antonoff's sponsor lists that a commercial had been broadcast that was not on WHBI(FM)'s log, she would write the commercial in on the log and sign and date the correction. During the period that Fermoselle was delivering his sponsor lists to WHBI(FM) subsequent to the broadcast of his program, the lists were brought to the station within an hour or two after the conclusion of the program and were handed to the engineer who had been on duty during Fermoselle's program who compared the lists with the basic log and made any changes which were required.

102. Lewis explained that he did not regard the act of copying information contained in the sponsor lists attached to WHBI(FM)'s program logs into the log form itself as correcting the log and that Allen Collins, the station's engineers, Davis and himself are all authorized to copy information from the sponsor list furnished by WHBI(FM)'s time brokers onto the log form subsequent to broadcast. Since the copying of information shown on the time brokers sponsor lists onto the log form is not regarded as a "correction" or "change" in the log, the persons authorized to do the copying are not instructed to write any explanation of what has been done on the log.

103. Sandra Davis and Allen Collins confirmed Donald Lewis' explanation of how WHBI(FM)'s program logs are prepared and corrected. Davis explained that she prepares the "diazo" sheets from which WHBI(FM)'s logs are printed and that these sheets contain a listing of all programs on WHBI(FM) and the commercials in the

programs. By comparing WHBI(FM)'s current log with the "diazo," Davis is able to keep the listing of commercials on the "diazo" up-to-date. When Davis gets the sponsor lists prior to broadcast she checks the printed log for the program involved and, prior to broadcast, she makes any changes which may be required so that the engineer will not have to make corrections on the log during the course of the broadcast. Davis has, on rare occasions, made corrections after a program was broadcast in which event she has signed and dated the corrections. It was not established that Davis, when she made corrections, was the person responsible for keeping the log, program director or an officer of Cosmopolitan.

104. Engineers on duty are required to monitor all English language programs and make whatever corrections to the logs may be found necessary as a result of hearing what is broadcast. Station engineers do not monitor foreign language programs. None of the engineers have any particular facility in any of the foreign languages which are broadcast. They are supposed to compare information furnished to the station by the time broker with the entries appearing on the log and to make corrections to the log which may be indicated by such comparison. Normally WHBI(FM) engineers can not and do not verify commercials listed on the log with the programs as they are actually broadcast. Where the tape cartridges have English labels, engineers may verify commercials that are broadcast by checking them on the log.

105. Occasionally, engineers recognize commercials by identification of sponsor names broadcast at the beginning and end of commercial messages. Aside from this, the engineer on duty does very little, if anything, to verify that the entries in the log conform with foreign language matter actually broadcast. To the greatest extent such

verification comes from the monitors who are hired to spot check various foreign language programs.

106. Sponsor lists have been required from foreign language time brokers since about 1969. This procedure was adopted by Cosmopolitan on advice of its communications counsel in order to obtain verification of the accuracy of the program logs. Sponsor lists are stapled to the log and the engineer on duty sees to it that the printed log conforms to the sponsor lists.

107. WHBI(FM) admitted its inability to comply with literal requirements of Section 73.112(a) of the Commission's Rules requiring that program logs be kept at all times by station employees "having actual knowledge of the facts required." WHBI(FM) relies upon the time broker in the case of its foreign language programs for the information necessary to prepare daily program logs.

108. Donald Lewis discussed this problem, WHBI (FM)'s logging practices, with Commission personnel in 1966. Attempts were made to devise some satisfactory means of effecting compliance with the Commission's Rules. These attempts were not entirely successful.

109. Lewis decided to achieve compliance by use of English labels on tape cartridges carrying foreign language commercials. In this way, he hoped that WHBI (FM)'s English speaking station engineers would be able to effect some measure of identification and be able to log foreign language commercial announcements. This didn't work and finally the station placed its reliance upon its system of hiring monitors to spot check programs and to note any deviations in commercial content from the information supplied to WHBI(FM) by the time broker. This monitoring is the method currently relied upon by WHBI(FM) to assure accuracy of program logs.

110. Beginnnig April 3, 1967 to December 15, 1967, WHBI(FM) broadcast a ten-minute daily program just before starting time at the Aqueduct Race Track in New York. This program was broadcast by Guy Michaels, a time broker. Michaels gave his analyses of the horses in two of the races, including a featured race, and gave his predictions as to the winners of the races on each days program at Aqueduct. He gave other racing information such as the relative values of the various post positions; the effect of weather and other track conditions on the performances of the horses; and interviews with horse racing experts such as jockeys, trainers and owners. He did not provide information as to probable odds or changes in jockeys.

111. For seven or eight years, WHBI(FM) carried a Race Results program from 6:30 to 6:45 p.m. This program included a sport announcement by Guy Michaels which might be described as "touting" [9] winners in horse races. This announcement was discontinued by Lewis when he decided that it was inappropriate even though he did not think it violated the law. Otherwise, the evening race results program broadcast by WHBI(FM) consisted of a summary of race results from four or five major race tracks, and pre-race information during the 1970 trotting season on races to be run at the Roosevelt Raceway.

112. Race results were broadcast after the running of all races at the tracks involved and gave such information as winning horses, prices paid, as well as the winners and prices paid in the Exactas and Daily Doubles. The Roosevelt Raceway information, which was discontinued after 1970, consisted of a taped telephone message

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[9] Webster's New Collegiate Dictionary, Second Edition defines "tout" as "To give a tip on (a race horse) with the expectation of sharing in the winnings." In this instance evidently "Race Results" restricted itself to giving "tips."

giving up-to-date information on that evening's program. It was taped by a member of the Roosevelt Raceway publicity office and made available to broadcast and newspaper media. It gave information as to changes in driver, scratches and post positions.

113. Late race results have been provided since 1968 by WHBI(FM) on its "News Roundup." "News Roundup" carries results of sport events other than horse racing. "Race Results" and "News Roundup" have been sponsored by two publications entitled *Sports Eye* and *Sports Action.*

114. Commercial announcements for these publications which were broadcast over WHBI(FM) emphasized the variety of racing and sports information such as selections, consensus and past performances, basketball schedules and best bets, baseball betting lines, ratings. Emphasis in the commercials was upon the usefulness of these publications to those who bet on sporting events. *Sports Eye* and *Sports Action* quite plainly are publications designed to assist those seeking enrichment by choosing in advance the winners in various sporting events. In its pages there are offered plans or systems to help the bettor as well as information by which the bettor could expect successful betting performance.

115. During April and May 1972, WHBI(FM) broadcast announcements telling listeners they could participate in a drawing for two television sets. Listeners were told they could participate by printing their names and addresses on box tops of Carolina Rice and sending these box tops to Richard Sugar who conducted a nightly program designed to appeal to Latin Americans among the station's listeners. In order to promote his program with his sponsor, Carolina Rice, Sugar devised a promotion by which he offered to give away boxes of rice to all who would write in a request. He gave away about 400 boxes of rice in this promotion.

116. As an additional promotion, he persuaded his sponsor to provide two television sets which would then be given to a winner of a drawing to be held at a specified dance. In order to participate in this drawing, listeners were asked to send in a box top from a box of Carolina Rice upon which they had written their name and address. Announcements of the contest and the method of participation were made on Sugar's program two or three times a night for about a month.

117. During the period of announcements regarding the contest, FCC employees called to ask if a reasonable facsimile could be used in place of an actual box top. They were told that a reasonable facsimile would not be acceptable. Sugar's announcements regarding his contest were heard by Lewis as they were broadcast over the air. He testified that he thought Sugar was asking for box tops from the boxes of rice which had been given away earlier.[10]

118. Barry Singer who was on the station board during the broadcast of the contest announcements recalled hearing something about a box top. Singer was under instructions since the time he was hired regarding lotteries and contests and he was told to report any such announcements to management. It did not enter his mind that the Carolina Rice contest was a lottery and he did not report to Lewis or Collins, the station manager, regarding these announcements. According to Sugar, the winner of the contest turned out to be an individual who obtained his box top from a free box of Carolina Rice.

119. Cosmopolitan is a closely held corporation in which Donald Lewis has owned at least 50% of the stock. Cosmopolitan does not have formal directors' or stockholders' meetings. During the period between March 26,

[10] This promotion took place during May, 1972.

1962 and October 13, 1969, when Cosmopolitan filed a series of corrected Ownership Reports with the Commission certain discrepancies existed between the information in its corporate minutes and the information in Ownership Reports which were on file with the Commission. Among these discrepancies were:

(i) Between March 26, 1962, and June 12, 1964, the Ownership Reports which Cosmopolitan had filed with the Commission showed Harold A. Segall as a director of the corporation and did not show the corporation as having a vice president whereas the corporate minutes for this same period did not list Harold A. Segall as a director and did show the corporation as having a vice president, Gilbert Siegal. Lewis explained that during the period covered by the foregoing Ownership Reports, Harold A. Segall was, in fact, a corporate director and the office of vice president was, in fact, vacant, as a result of the agreements governing the merger of Cosmopolitan and Suburban Broadcasting Corporation. These facts were not properly reflected in Cosmopolitan's minutes. Gilbert Siegal, Lewis' lawyer, confirmed that during the years 1962 to 1964 he was not an officer of the Corporation.

(ii) On March 5, 1963, Cosmopolitan filed an Ownership Report dated as of March 4, 1963 which showed Donald Lewis as Cosmopolitan's president and Martin Stone as its secretary-treasurer whereas the offices which they held were just the reverse. Lewis explained that he personally had prepared and filed the March 4, 1963 Ownership Report which was required in connection with WHBI(FM)'s 1963 license renewal application without the assistance of counsel. Since he had been responsible for constructing WHBI(FM) and placing it on the air, and since he was acting as its general manager and was also

negotiating to purchase Suburban's stock in Cosmopolitan, Lewis looked upon himself as president and so listed himself in the Ownership Report. Lewis signed the March 4, 1963 Ownership Report listing himself as president and Martin Stone as secretary-treasurer; he was not aware that Stone was listed as president in the corporate minutes and that he was listed as secretary-treasurer. The error which appeared in the March 4, 1963 Ownership Report was corrected by an Ownership Report of August 9, 1963 which was prepared by Suburban's communications counsel and filed by Cosmopolitan on August 16, 1963 in connection with the transfer of Suburban's stock in Cosmopolitan to VIP Radio, Inc.

120. On June 10, 1964, Cosmopolitan purchased all of its stock held by VIP Radio and, since then, Donald Lewis has owned 87% or more of Cosmopolitan's issued and outstanding stock. Donald Lewis explained that, owning such a large percentage of stock, he was able to name officers and directors at will, but he did not realize the importance of having all such changes reflected in appropriate corporate minutes. Therefore, between the time he became the controlling stockholder of Cosmopolitan and 1969, when he retained communications counsel to assist him in filings with the Commission, certain additional discrepancies between the listings of corporate officers and directors in Ownership Reports and in the corporate minutes occurred. These discrepancies were all corrected in an Ownership Report as of February 24, 1969 filed on May 12, 1969.

121. During the period prior to May 12, 1969, certain transactions in Cosmopolitan's stock were not reported to the Commission within thirty days. One such transaction involved the transfer of five shares of stock (5%) from Donald Lewis to William Masi. This transaction took place on December 22, 1964, but was not reported on an Ownership Report until February 25, 1966.

122. Lewis explained that the delay in reporting this stock transaction resulted from his belief that it was not necessary to report transfers of stock which did not affect control until the next time a license renewal application was filed. The transfer of the five shares of stock to William Masi was reported to the Commission on the Ownership Report which Cosmopolitan filed in connection with WHBI(FM)'s first license renewal application following the transaction.

123. The transfers of single shares of stock from Donald Lewis to Gilbert Siegal, Charles Okin and Ary Siegal on August 31, 1966, were not reported to the Commission until the filing by Cosmopolitan of the Ownership Report required in connection with WHBI(FM)'s 1969 license renewal application. Again, the reason was that Lewis thought that transactions not affecting control did not have to be reported until renewal.

124. On October 13, 1969, Cosmopolitan filed a series of corrected Ownership Reports covering the period from March 24, 1962 through February 24, 1969. Since May 12, 1969, all changes in Cosmopolitan's officers, directors and stockholders have been timely and accurately reported to the Commission.

125. Cosmopolitan entered into an agreement with William A. Masi on June 26, 1962, calling for the transfer of 5% of the stock of Cosmopolitan to Masi. At the time this agreement was entered into Donald Lewis and Suburban Broadcasting each held a 50% interest in Cosmopolitan. Eventually, the 5% stock was given to Masi, but the agreement which provided for Masi's stock interest was not filed with the Commission. According to Lewis he did not realize that an agreement to transfer stock in the future had to be filed with the Commission.

126. In its 1969 license application, WHBI(FM) represented that it would broadcast three hours of news per week. According to its program logs, WHBI(FM) met

this promise with a number of taped programs which were made available to it by various state and public agencies, including New Jersey Department of Transportation, Rutgers University, and National Aeronautics and Space Admn. These tapes contained information regarding current developments in the fields of space, transportation and science. It was admitted that these programs did not include "news" in the sense of happenings which had occurred within a twenty-four-hour period immediately preceding broadcast.

127. Much of the news broadcast by WHBI(FM) is presented during the course of various foreign language programs in the form of items of particular interest to the foreign language audiences. This news is presented on an irregular basis and is not ordinarily entered upon WHBI(FM)'s program logs. WHBI(FM) is now following the practice of having its foreign language time brokers report news programs as a separate category. Such news is now entered on WHBI(FM)'s logs in connection with the various foreign language programs.

128. A substantial portion of WHBI(FM)'s programming is foreign language. All such foreign language programming is the product of time brokers who have contracted with WHBI(FM) or sub-brokers who have bought time on WHBI(FM) through a time broker. Most of WHBI(FM)'s foreign language programming is in Italian or Spanish, but the station also broadcasts programs in about twenty other foreign languages. These foreign language broadcasts consist of entertainment, usually music which is indigenous to the people of the country involved, announcements of interest to the particular foreign community and commercials of merchants interested in selling to the particular ethnic group. Occasionally, an outstanding visitor to the United States from the native land of a particular foreign language time broker may be given time to speak to his countrymen. Neither

Donald Lewis nor any member of the staff or management of WHBI(FM) has anything to do with the content of the programs broadcast by foreign language time brokers other than to make an occasional suggestion.

129. As already mentioned, a considerable portion of WHBI(FM)'s programming is in foreign languages directed to particular ethnic foreign language groups. All these programs are, in content, the product of time brokers who pay WHBI(FM) for the time in which their programs are broadcast. In a few instances, a particular program is the product of an individual who for reasons of preference is credited as an employee, but this status is largely technical involving one or two individuals who, in fact, operate as independent contractors rather than time brokers. Donald Lewis may occasionally make some suggestions regarding programming to a time broker. His involvement, however, is no more than to select a particular time broker from among many seeking to buy time on his facility. To the extent that Donald Lewis makes such a choice he is selecting the language or ethnic group who will be served by the station's programming. There was testimony from a number of academic figures who expressed the view that there were benefits to be derived from programming in the native languages of the various foreign language people residing in the station's service area. None of these testimonials was given by a regular listener to WHBI(FM). At best, this particular testimony may be summed up as providing expert opinion to the effect that foreign language or ethnic programming is a good thing, generally speaking. There was also some testimony that WHBI (FM) was useful as a means of reaching people who might be served by specialized academic courses provided by New York University to foreign-born residents.

130. WHBI(FM) is licensed by the Commission to serve as a facility for the City of Newark, New Jersey.

WHBI(FM) does maintain an auxiliary studio in Newark, New Jersey; however, all of its actual broadcasts emanate from its main studio which is located in New York City pursuant to authorization from the Commission. The auxiliary studio is located in space provided by a time broker who uses WHBI(FM). There is some equipment in the studio but it is not used for the purpose of actual broadcasts.

131. Although licensed to Newark, New Jersey, WHBI (FM) has no listing in the Newark telephone directory. Its auxiliary studio, the only Newark contact it has, is not used to broadcast any of its programs.

132. WHBI(FM) carries a fifteen-minute taped message distributed by the office of the Mayor of Newark to broadcast stations requesting it. The tape, which is provided on an irregular basis, is carried at 7:45 a.m. or 8:00 a.m.

133. In early 1972 and until the middle of December 1972, WHBI(FM) carried a fifteen-minute program by Charles Bradley broadcast between 6:00 p.m., and 6:15 p.m. This program consisted of discussions and interviews with leaders in all walks of life. Bradley's guests included the executive director of the Urban League, the vice president of Minority Employment in Newark, the president of Morehouse College, the coordinator of African Studies for the American Museum of Natural History, black poets in the Newark area, a black jazz pianist in New York City and Mayor Gibson of Newark. Bradley ceased his employment with WHBI(FM) in December 1972 and the program was terminated. Bradley was paid $10.00 for each fifteen-minute program.

134. WHBI(FM)'s service to Newark was discussed by Douglas Eldridge. Eldridge has been an editor in the Newark Public Information Office, an agency within the Mayor's office of the City of Newark, since July 1972.

Prior to this, Eldridge was employed for fifteen years as a reporter on the *Newark News*. From 1963 until 1971, Eldridge specialized in coverage of Newark community news for the *Newark News*, with special emphasis on the civil rights movement and federal anti-poverty and urban problems. He also reported on virtually all major issues in Newark during this period and the activities of many community groups. He also covered local election campaigns.

135. During all the time he covered community events he never encountered anyone from WHBI(FM). At the many press conferences and other events he attended, WHBI(FM) was never in evidence among the broadcast media representatives. In his discussions with community leaders during this period, he does not recall a single reference to WHBI(FM) or any indication that it was a factor in community life.

Conclusions

1. Cosmopolitan Broadcasting Corporation has applied for renewal of its license to operate an FM broadcast station on a frequency allocated by the Commission to Newark, New Jersey. Cosmopolitan is the corporate alter ego of Donald Lewis. Lewis as the owner of Cosmopolitan exercises total and personal control over the policies, procedures and practices by which his broadcast station is operated.

2. In its Order of designation, the Commission raised thirteen issues upon which to resolve whether Cosmopolitan has the qualification to remain a licensee and whether grant of its application for renewal of its license would serve the public interest, convenience and necessity. Under the first of these issues, we are called upon to determine whether this licensee exercised adquate control and supervision over the programming and other operations of its station. To some extent, the determination

to be made under this issue overlaps the determination to be made under subsequent issues in this proceeding. In the first instance, then, we shall confine ourselves to those matters which are uniquely related to this particular issue.

3. WHBI(FM) operates twenty-four hours a day seven days a week. Lewis employs a staff consisting of a station manager, a secretary-clerk, and about five station operating personnel. He has no staff for the purpose of producing programs and he evidently maintains no facilities for the purpose of producing programs.

4. All of the programming of station WHBI(FM) is produced by sources independent of the licensee. By far, the greatest portion of the programming of WHBI(FM) is the product of time brokers who buy specific time periods during which they broadcast whatever they consider appropriate. In addition to the fact that WHBI (FM) produces no programs for broadcast, it also makes no effort to sell any commercials. Virtually all commercials broadcast by WHBI(FM) are sold by time brokers and broadcast during their allotted time periods. WHBI (FM) does not share in the receipts for commercials sold by its time brokers but rather derives its revenues from payments made for broadcast time.

5. Lewis' initial effort to program his station with material that would appeal to the black population of his city and service area foundered, not because there was no public demand for the service, but rather for the failure of commercial support. Moving into the ethnic field, Lewis found the success he was seeking.

6. Most of the programming of WHBI(FM) is in foreign languages. While there is a substantial variety of languages broadcast, the greater portion is Italian and Spanish. These foreign language programs are the product of time brokers who are selected by Donald Lewis;

except in those cases where a time broker sub-brokers time to another foreign language time broker. Lewis has neither fluency nor understanding of any language other than English. This is also true of all of his regular paid staff of employees.[11]

7. Lewis' practice is to select foreign language time brokers from a waiting list he has accumulated of individuals seeking time. He claims as his purpose to select time brokers so as to enhance the variety of languages presented by WHBI(FM). He interviews prospective time brokers and learns about their background in these interviews. There is no evidence that any substantial effort is made to check backgrounds independently of such interviews. An individual who is selected by Lewis to utilize a block of time on WHBI(FM) is given written and oral instructions by Lewis as to FCC and station requirements regarding programming. Nevertheless, in every instance the time broker is left to select the material which is broadcast during his allotted time period.

8. Lewis, himself does not have enough understanding of any foreign language to be able, by listening to programs, to know what is being broadcast or whether or not the Commission's Rules and Regulations are being observed. Some effort in this direction is exercised through the use of monitors who are selected by Lewis—often by reference to him from a time broker. These monitors are paid a nominal sum and are instructed to listen to particular programs and complete a form. These monitors concern themselves with assuring that the commercials broadcast during a particular program comply with

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[11] Evidently, there had been occasions where an operator had a smattering of knowledge of Italian but this would be mere happenstance and there was no evidence of any employee who had a fluent knowledge of a foreign language.

a list of commercials submitted by the time broker to the station for inclusion in the program log. In many instances, the monitor is acquainted with the time broker whose program is monitored.

9. From time-to-time Lewis notifies time brokers regarding particular Commission programming requirements to be observed. This may be done in the form of written communication or by oral instruction given over the telephone. All instructions to time brokers are given in English although English is usually not the native language of the individual receiving the instruction. Lewis' internal procedures for maintaining control over the activities of his foreign language time brokers are set out in detail in the findings and need not be restated here. Lewis maintains a skeleton operation for the purpose, as he puts it, of keeping his costs low so as to enhance his ability to make time available to foreign language time brokers at low rates. This commendable purpose has served Lewis well as shown by the substantial and ever increasing gross revenues realized by him from the sale of broadcast time.

10. In its Public Notice of March 30, 1967, the principles of which were reaffirmed by the Commission in its Memorandum Opinion and Order released March 13, 1973, the Commission stated the following:

> "Licensee responsibility requires that internal procedures be established and maintained to insure sufficient familiarity with the foreign languages to know what is being broadcast and whether it conforms to the station's policies and to requirements of the Commission's rules."

Based upon the evidence developed in this proceeding we are bound to conclude that Lewis' internal procedures to meet the standards which the Commission directed be observed are, at best, minimal. In the case of the foreign

language broadcasts over WHBI(FM), there has been a virtual abandonment of responsibility from the licensee to the time broker. Lewis' efforts to assure licensee control over program content are virtually non-existent. His primary interest is quite plainly to see to it that all broadcast time is occupied by persons willing to pay for the time and to shoulder the burden of delivering to the station the program material which then requires no effort by the licensee except the mechanical operation of playing a tape. In this regard, Lewis seems to have been uniquely successful in that he has been able to eliminate all effort in the area of programming on the part of himself or any station employee. In effect, Lewis has become, not so much a licensee, as, a broker who sells time and makes the most modest pro forma efforts in the direction of assuring compliance with Commission and station policies by his clientele.

11. In the case of some foreign language broadcasts, Lewis has no direct contact with the individual who provides the programming. Emil Antonoff is responsible for a substantial block of time which is programmed for broadcast over WHBI(FM). Antonoff, himself, operates what might be described as a limited broadcast operation. He has a studio where programs are recorded. He lends assistance to program producers and he sells them time which he has purchased from WHBI(FM). Antonoff is fluent in a number of languages and he participates with his brokers in their production activities. Lewis on the other hand has virtually no contact with the individuals who buy their time through Antonoff.

12. The Commission has encouraged foreign language prgramming and has refrained from imposing particular restrictive requirements as to their control.[12] Neverthe-

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[12] *Memorandum Opinion and Order*, FCC 73-269, March 13, 1973, *In the Matter of "Licensee Responsibility to Exercise Adequate Control Over Foreign Language Programs."*

less, in the context of the general requirements which the Commission has laid down, we must conclude that Lewis has not maintained his operation in such a manner as to meet the standards of control over foreign language broadcasts which the Commission expects a licensee to maintain.[13]

13. English language programming which constitutes a minority of the programming broadcast over WHBI (FM) poses a different situation. A substantial block of English language programming is broadcast during time sold to Dean Lewis. Dean Lewis has operated under various trade names. His method of operation is one of those aspects of this proceeding which is dealt with under a number of subsequent issues. We are bound to conclude that Donald Lewis' internal procedures were not designed so much as a check to assure control over Dean Lewis' broadcasts as a lubricant to assure Dean Lewis' continued business relationship with WHBI(FM). The hours of 3:00 to 6:00 a.m., are not the most saleable time slots in the operation of a broadcast station. Dean Lewis took this time and paid Donald Lewis for it, and then

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[13] *Ibid.* See also Public Notice, FCC 67-368 released March 30, 1967, *"Broadcasters Cautioned to Exercise Adequate Control Over Foreign Language Programs"* in which the Commission said:

> "Essential to the exercise of proper licensee responsibility in this matter is knowledge of the content of such broadcasts. Commission inquiry reveals that a number of licensees have no familiarity with the foreign languages and, thus, no knowledge of the content of such broadcasts. They explain their practices as follows: (1) they permit only persons of established reputation for judgment and integrity to use their facilities; (2) copies of commercial announcements used on foreign language programs must be submitted in advance in English translation; (3) recordings of all programs are made and retained for future reference. We do not regard such procedures, in and of themselves, as sufficient to insure licensee knowledge of and control over foreign language programming.

relieved Donald Lewis of his responsibility for the content of the programs broadcast.

14. Dean Lewis sold as much of his time as possible in five-minute segments to as many individuals as he could persuade that RCC, RCA or MCA [14] could open the door to a career in broadcasting for them. These individuals were allotted free reign as to the content of the programs which they prepared for broadcast. They were also free to make whatever sales they could of commercial time within the periods they would program. Donald Lewis had no contact with any of these people either before, during or after their use of his license facility. His knowledge evidently came when questions were raised by federal and local authorities regarding Dean Lewis' operations.

15. It is seriously doubtful that by grant of a license to Cosmopolitan the FCC contemplated an operation such as that which Donald Lewis finally adopted. There is no disputing that his formula has been financially successful, but adequate control and supervision by the licensee over the programming of his station has not been any part of that success. Lewis' achievement is a reflection of the cost savings realized from the virtual abandonment of control and supervision over the programming of WHBI(FM). We are bound to conclude that under issue (a) the licensee has not exercised adequate control and supervision over substantial portions of the English language and virtually all of the foreign language programs broadcast by WHBI(FM).

16. Issue (b) calls for a determination of whether WHBI(FM) broadcast deceptive or misleading advertising. Dean Lewis through his enterprises purchased the early morning hours on station WHBI(FM) for his program "Kaleidoscope." Besides using "Kaleidoscope" as the broadcast medium for his "training" enterprise,

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[14] Dean Lewis' various trade names.

Dean Lewis also used broadcast time for commercials to sell his services. Some of these commercials were taped in advance and in other instances they were spoken by the operator on duty at the station. A number of tapes of such commercials were provided and from the transcripts Dean Lewis identified the material as the type of announcements made over WHBI(FM) on behalf of his enterprise. Based upon the available evidence we conclude that the tapes provided represent the commercial material actually broadcast on behalf of Dean Lewis' enterprises over WHBI(FM). An example of the type of commercial is set out in paragraph 55, *supra*, of the findings.

17. Dean Lewis' enterprises are described in the findings. His commercials go beyond mere puffery. Dean Lewis' commercials as broadcast over WHBI(FM) were deceptive and misleading. Eventually, the Federal Trade Commission found it necessary to knock off some of the roughest edges of Dean Lewis' opportunistic use of Donald Lewis' licensed facility. We conclude that the commercials broadcast on behalf of Dean Lewis' enterprises were deceptive and misleading.

18. Issue (c) requires a determination as to whether Donald Lewis permitted use of WHBI(FM) by Dean Lewis for the purpose of misleading people into believing they were going to get employment rather than buy a course of study and training which would include an opportunity to buy time as a sub-broker on station WHBI(FM). Two of the witnesses who testified were persons who had signed for Dean Lewis' services. One of them maintained that he was misled and the other expressed his complete satisfaction with his experience with Dean Lewis. Neither of these individuals represented a level of sophistication and worldliness to make them the equal of Dean Lewis. Based upon the spot announcements, the newspaper advertising, and the mode of oper-

ation by which Dean Lewis dealt with his clientele, we conclude that his activities followed a basic pattern designed to mislead the hopeful into believing that he was opening the door to great opportunity in broadcasting for them.

19. Regardless of the efforts of the Federal Trade Commission, or of the attention sought by the Jersey City Police Department, or of Donald Lewis' own awareness of the type of advertising Dean Lewis was using, Dean Lewis was still permitted to continue to use time on WHBI(FM); to use WHBI(FM)'s telephone; and to use WHBI(FM)'s call letters in furtherance of his enterprise. Donald Lewis' obligation to operate in the public interest melted before his greater interest to achieve a substantial gross income. Donald Lewis allowed Dean Lewis to use WHBI(FM) to mislead people into believing they were responding to a call for employment when in fact they became prospects for the sale of air time, instruction and training.

20. Dean Lewis' operation was such that he generated a considerable number of time brokers with WHBI(FM). This activity resulted in contracts which were required to be filed with the Commission within a specified period of time. Complications arising out of Dean Lewis' bankruptcy and changes of name; out of the fact that some of his clientele became time brokers while others merely broadcast porgrams; and the delays that arise as a consequence of large volume paper work resulted in numerous failures by WHBI(FM) to meet the requirements of Section 1.613(c) of the Commission's Rules. A list of contracts not timely filed was set out in paragraph 79, *supra*. WHBI(FM)'s failure to file contracts on time extended also to subbrokers in the foreign language programming. We conclude that the applicant failed, in numerous instances, to file contracts on time with the Commission as required under Section 1.613(c) of the Rules.

21. Issue (e) enlarged by the Review Board requires a determination as to whether the applicant violated Commission regulations by its failure to make entries in program logs properly identifying the political affiliation of candidates for political office; its failure to log the broadcast of political announcements; its failure to identify the person or persons who paid for political announcements; its failure to make program entries identifying programs by type; and its failure to explain and sign corrections to program logs. These failures relate to the requirements under Section 73.282 of the Commission's Rules relating to program logs of FM licensees. The findings in paragraph 82, *supra*, sets out a list of political announcements not entered on the program log of WHBI(FM). Paragraph 83 of the findings, *supra*, sets out a list of announcements which fail to include an entry identifying who paid for the announcement; and paragraph 84 of the findings, *supra*, sets out a list of instances in which the applicant failed to indicate program type in its program logs. The extent of WHBI(FM)'s program logs failure to reflect required entries with regard to political announcements is summed up in paragraph 99, *supra*. As to issue (e), it is concluded that WHBI(FM) failed in a large number of instances to comply with the program log requirements related to political announcements.

22. Issue (f) calls for a determination as to whether or not the applicant maintained and had available for public inspection certain records as required by Section 73.289(f) and 73.290(d) of the Commission's Rules. These regulations require that a record be kept of the officers or principals of political groups sponsoring political announcements and that the licensee keep a record available for public inspection of all requests made for time for political announcements showing the disposition made of such requests and the charges for announce-

ments that are broadcast. WHBI(FM)'s political file did not have a record of unfilled requests for political announcements. According to Donald Lewis, there was no record kept because all requests for broadcast time had been granted. So far as the other records were concerned, these had not been kept because Lewis was not aware of the requirement. After hearing from FCC investigators, he gave instructions for such records to be kept. We must conclude, however, that WHBI(FM) did not keep a political file which met all the requirements of the Commission's Rules.

23. Issue (g) calls for a determination as to whether WHBI(FM) met the Commission's requirements regarding charges for political announcements broadcast. As shown in the findings, *supra*, virtually all the political announcements broadcast by WHBI(FM) were obtained and programmed by foreign language time brokers using the station. Rates charged varied from candidate to candidate and in a few instances rates charged a political candidate exceeded normal commercial rates for similar time. One explanation for the political charges was the fact that the time broker was paid not only for broadcast time but also for his services in preparing and announcing the copy for a political candidate. Nevertheless, there was no separation of charges between services and broadcast time. Donald Lewis made a number of efforts to straighten out this situation which finally culminated in a directive to his time brokers that all political announcements were to be charged at the rate of $5.00 per minute. Whether or not this dictum was observed, its promulgation was a consequence of the difficulties arising in this area.

24. Donald Lewis sold time to many many time brokers. These time brokers in turn sold commercials and political announcements to be broadcast during their time

periods. Donald Lewis did not understand the languages broadcast and he had no participation in the proceeds realized by time brokers from their sales. There is no evidence in the record from which a conclusion can be drawn as to whether or not the rates charged for political announcements resulted in violation of the Commission's Fairness Doctrine or discouraged candidates from using WHBI(FM)'s facilities. However, there is evidence and it is concluded that rates charged on behalf of certain candidates exceeded the rates charged other candidates and commercial advertisers.

25. Issue (h) calls for a determination whether program logs of WHBI(FM) were kept in accordance with the requirements of Section 73.281(a) of the Commission's Rules so far as foreign language programs were concerned. Section 73.281(a) requires that logs be kept by competent station employees who have actual knowledge of the facts. This section of the Rules also requires the licensee to maintain program logs in accordance with Section 73.282 of the Commission's Rules. Section 73.282 relates to program logs. Section 73.282 permits program log entries to be made either before or at the time of broadcast. This section also imposes a requirement that when preprinted program logs are used corrections must be made either by the operator on duty when going off duty; or by the operator, program director or manager or an officer of the licensee if corrections are made after the operator goes off duty. Such corrections must be accompanied by an explanation on the log or by an attachment to the log. WHBI(FM)'s program logs were preprinted. Many corrections were made based upon information given by various foreign language time brokers. Occasionally, a station operator could identify a commercial even though he did not understand the language in which it was broadcast. Most usually, corrections regarding commercials actually broadcast came from the time broker or the monitor. These corrections were made

by Donald Lewis' secretary, Sandra Davis. Davis is not a person authorized to make corrections under the Commission's Rules. Station operators aren't able in most instances to verify the log against what they hear broadcast since they do not understand the language involved. It is the applicant's contention that changes on the "diazo" log based upon information supplied by the time broker are not to be considered as corrections. Certainly such changes are not recorded as corrections. Nevertheless, such changes are made subsequent to broadcast as well as before broadcast. To the extent that changes were made in log entries subsequent to broadcast and to the extent that these changes were made by Davis and to the extent that such changes did not include the required explanation, WHBI(FM)'s logs were not being kept consistent with the requirements of the Commission's Rules. All of these violations did occur, and it is concluded that WHBI(FM) failed to observe the requirements of Section 73.281(a) of the Commission's Rules with respect to log entries pertaining to foreign language programs.

26. Issues (i) and (j) call for a determination as to whether WHBI(FM) broadcast information of various types which would aid illegal gambling. WHBI(FM) did broadcast certain sports programs which gave information regarding horse racing and other sports activities. This information certainly was useful to individuals interested in gambling. However, these two issues must be resolved in the context of the situation which exists in the station's broadcast area. Gambling in a large measure is not illegal in New York and New Jersey. Both states have official lotteries and permit parimutuel betting at race tracks. In addition, New York City permits off-track betting in shops operated by the government. In these circumstances, it must be concluded that there is reasonable doubt as to whether the information broad-

cast aided illegal gambling. We cannot conclude that the applicant did intend or know that these broadcasts would assist illegal gambling or furnish information to illegal gamblers or bookmakers.

27. Issue (k) calls for a determination as to whether WHBI(FM) permitted broadcasts of information concerning a lottery in violation of Title 18 U.S. Code Section 1304. Richard Sugar, a time broker who broadcasts a program designed to appeal to Latin Americans did broadcast information designed to promote a lottery. Donald Lewis was aware of these broadcasts as were his employees but it did not occur to him or them that Richard Sugar's "promotion" was a lottery. Nevertheless, the elements of a lottery—consideration, chance and prize—were all present and the Commission's Rules and the criminal statute were violated.

28. Issue (l) calls for a determination as to whether there was failure to file Ownership Reports in violation of Section 1.615 of the Commission's Rules. Violations of this Rule are delineated in paragraphs 119 through 125 of the findings. These failures on the part of Cosmopolitan are the reasonable expectation in the case of a licensee that is a one-man business operating behind a corporate veil. These violations do not reach the level of a plan or design to deceive the Commission, but they are indicative of an effort to operate with minimum staff and minimum expenditure for available expert advice which would have avoided trouble. Cosmopolitan did fail in a number of instances to comply with the requirements of Section 1.615. These failures were corrected once the requirements were called to the licensee's attention.

29. In its 1969 license renewal application, WHBI(FM) represented that it would broadcast three hours of news per week. WHBI(FM) produces no programs leaving all programming to its time brokers, com-

mercial religious program producers and commission salesmen. To the extent that it broadcasts anything which is not the result of the efforts of the foregoing, WHBI(FM) uses tapes made available by various state and public agencies. Some of these tapes deal with current developments. None of these can be counted as news. Some of the time brokers may broadcast news but we have no evidence of this fact sufficient to satisfy this issue. It is concluded that WHBI(FM) did not carry out its promise by broadcasting "news" as represented in its 1969 license renewal application.

30. At the behest of the applicant, the Review Board added a meritorious programming issue to this proceeding. Under this issue particular regard is to be paid to public service programs. In its Order granting the issue the Review Board emphasized that while the applicant would have the opportunity to offer evidence of ethnic programming, such programming would not necessarily be deemed meritorious merely because it is intended to serve the needs and tastes of ethnic minorities. From the evidence presented by the applicant it has been found that numerous ethnic programs in a variety of languages are presented. The applicant also presented evidence through well-known anthropologists and sociologists to the effect that such programming is in the public interest.

31. This expert advice was unnecessary. The Commission has long been aware of the salutary public service of foreign language broadcasts. In its Memorandum Opinion and Order, FCC 73-269, *supra*, the Commission said:

> "Moreover, as set forth in our *Programming Policy Statement*, 25 Fed. Reg. 7291, 7295, one of the major elements usually necessary to meet the needs of the community is 'Service to Minority Groups,' and from the earliest days of regulation the FRC and the FCC have commended broadcasters for foreign language

programming designed to serve the needs of minority groups in their communities. *Johnson-Kennedy Radio Corp.*, (WJKS), Docket No. 1156, affirmed *sub nom F.R.C. v. Nelson Bros. Co.*, 289 U.S. 266, 270-71 (1933); *United States Broadcasting Corp.*, 2 FCC 208, 233 (1935).

We can give Cosmopolitan some credit for its ethnic broadcasts but except for variety, there is no other merit shown.

32. In evaluating the programming of station WHBI(FM) to determine whether or not it was meritorous we cannot avoid a nagging question which arises out of the fact that its city of service is Newark, New Jersey. It is well known that during most of the period with which we dealt regarding WHBI(FM)'s programming that the city of Newark went through some of the worst racial conflict in the country. Through it all, evidently, WHBI(FM) made no contributions towards assisting those who undertook to achieve some measure of relief from the burdens borne by this unhappy community. Attached to this Decision as an appendix is a recent story appearing in the *New York Times* which gives some idea of the recent past history of Newark, New Jersey, and the extent to which progress has been made. WHBI(FM) made no contribution to that progress. Under all circumstances we cannot conclude that the programming of station WHBI(FM) was particularly meritorious.

33. Finally, we must determine whether in the light of the evidence under the preceding issues, Cosmopolitan possesses qualifications to remain a licensee of the Commission. On all the evidence and evaluating the conclusions reached on all the preceding issues, it must be concluded that Cosmopolitan has not shown that it possesses the requisite qualifications to remain a licensee of the Commission. Cosmopolitan has operated its broadcast facility in such a way as to virtually abandon all inter-

est and control in the programming of its station to various time brokers, religious broadcasters and commission salesmen. Cosmopolitan's mode of operation does not comport with the precepts of licensee responsibility repeatedly laid down by the Commission over the years. As the Commission has said:

> "The foundation of the American system of broadcasting was laid in the Radio Act of 1927 when Congress placed the basic responsibility for all matter broadcast to the public at the grass roots level in the hands of the station licensee. That obligation was carried forward into the Communications Act of 1934 and remains unaltered and undivided. The licensee, is, in effect, a 'trustee' in the sense that his license to operate his station imposes upon him a nondelegable duty to serve the public interest in the community he had chosen to represent as a broadcaster.
>
> "*Great confidence and trust are placed in the citizens who have qualified as broadcasters. The primary duty and privilege to select the material to be broadcast to his audience and the operation of his component of this powerful medium of communication is left in his hands.*" (Underlining added.) (*Report and Statement of Policy Res: Commission en banc Programming Inquiry*, 44 FCC 2d 2303, 2311-2312 (1960))

34. Time brokering is permitting by the Commission but the possibility of adverse impact of time brokering upon the duties and obligations of a licensee is well recognized. The Commission has also recognized that extensive time brokering may be contrary to the public interest resulting as it does in the lessening of licensee control over programming.[15] Cosmopolitan engaged in a

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[15] *In the Matter of Clarifying Paragraph (c) of Section 1.613, Concerning the Filing of Agreements Involving the Sale of Broadcast Time for Resale*, 33 FCC 2d 653-655 (1972).

maximum resale of time and a minimum of control over how that time was actually used. Donald Lewis' practices and procedures were designed with a view towards minimizing his costs rather than maximizing his control over the most basic responsibility that a licensee has—programming his station. The consequence of the type of control exercised by Donald Lewis is exemplified by the numerous violations of Commission Rules and Regulations which did crop up. There was lottery, false and misleading advertising, improper logging, failure to meet filing requirements, inadequate record keeping, all resulting from practices followed by a licensee who minimized his participation in programming to the extent that he virtually abandoned his licensed facility to the use of others.

35. Based upon all of the evidence and upon the conclusions reached on all of the foregoing issues, it is determined that grant of Cosmopolitan's application for renewal of its license for WHBI(FM) would not serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by a party to this proceeding or the Commission reviews the decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Cosmopolitan Broadcasting Corporation (BPH-1359, BRSCA-746) for renewal of Main, Auxiliary and SCA license for WHBI(FM) IS DENIED.[16]

/s/ ERNEST NASH
Administrative Law Judge
Federal Communications
Commission

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[16] Absent exceptions, appeal or review, this decision will become effective 50 days from the date of its release.

APPENDIX D

F.C.C. 76-459

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 19657
File Nos. BRH-1359
BRSCA-746

In Re Application of
COSMOPOLITAN BROADCASTING CORPORATION,
NEWARK, NEW JERSEY

For Renewal of License for Station WHBI-FM

Appearances

Thomas Schattenfield and *David Tillotson* on behalf of Cosmopolitan Broadcasting Corporation, and *Joseph Chachkin* on behalf of the Chief, Broadcast Bureau.

DECISION

(Adopted: May 19, 1976; Released: June 3, 1976)

BY COMMISSIONER LEE FOR THE COMMISSION:

1. Before the Commission is the application of Cosmopolitan Broadcasting Corporation (Cosmopolitan) for renewal of its license for station WHBI(FM), Newark, New Jersey. After finding serious questions as to whether the applicant possessed the qualifications to be or remain a Commission licensee, we designated this proceeding for hearing by an Order and Notice of Apparent Liability (FCC 72-1137, released December 19, 1972) on the following issues:

(a) To determine whether the applicant has exercised adequate control and supervision over the program-

ming and other operation of Station WHBI consistent with licensee responsibility.

(b) To determine whether the applicant broadcast deceptive or misleading advertising.

(c) To determine whether the licensee permitted a time broker to use the licensed facility in furtherance of a scheme to obtain monies from persons who were misled to believe they were being offered employment when, in fact, the purpose was to obtain purchases of a time broker's service, facilities, air time or course of instruction and training.

(d) To determine whether the applicant failed timely to file with the Commission contracts relating to the resale of broadcast time in violation of Section 1.613(c) of the Commission's Rules.

(e) To determine whether the applicant failed to make entries in the program logs of WHBI properly identifying the political affiliation of certain candidates for public office in violation of Section 73.282 of the Commission's Rules.

(f) To determine whether applicant failed to maintain certain records and make them available for public inspection as required by Sections 73.289(f) and 73.290(d) of the Commission's Rules.

(g) To determine whether the rates charged for announcements broadcast by WHBI on behalf of candidates for political office exceeded that charged for announcements broadcast by WHBI for other candidates and other commercial advertisers and, if so, whether this practice violates the fairness doctrine or by engaging in that practice the licensee is otherwise not serving the public interest by discouraging candidates for political office from using the licensed facility.

(h) To determine whether the applicant failed to make proper entries in the program logs of WHBI containing information pertaining to foreign language programs in violation of Section 73.281(a) of the Commission's Rules.

(i) To determine whether applicant has broadcast detailed pre-race information prior to horse racing events and, if so, whether such broadcasts were intended to be of aid to illegal gambling or might reasonably have been expected to be of such aid.

(j) To determine whether applicant broadcast information sponsored by publishers of "scratch-sheets" or other publications disseminating detailed horse racing information by touts or other persons whose activities may result in aiding illegal gambling or furnishing information to illegal gamblers or bookmakers; and if other information was broadcast which may have resulted in aiding illegal gambling on events other than horse racing.

(k) To determine whether applicant broadcast an advertisement or information concerning a lottery in violation of Title 18 U.S.C. Section 1304 (1964).

(l) To determine whether applicant failed timely to file ownership reports to the Commission in violation of 1.615 of the Commission's Rules.

(m) To determine whether the licensee has substantially carried out its representations in its application for renewal in regard to the presentation of news by Station WHBI.

(n) To determine whether, in the light of the evidence adduced under the foregoing issues, the licensee possesses the requisite qualifications to remain a licensee of the Commission.

(o) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the captioned application would serve the public interest, convenience and necessity.

We further ordered that if the hearing record did not warrant denial of WHBI's renewal application, a determination should be made whether Cosmopolitan violated 18 U.S.C. 1304 [1] within one year of the issuance of the Bill of Particulars specifying such violations and, if so, whether a forfeiture should issue pursuant to Section 503(b) of the Communications Act.

2. In a Memorandum Opinion and Order (FCC 73R-89) released February 27, 1973, the Review Board added an issue:

> To determine whether the programming of Station WHBI(FM) has been meritorious, particularly with regard to public service programs.[2]

3. In an Initial Decision (FCC 74D-41) (I.D.), released July 25, 1974, Administrative Law Judge Ernest

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[1] 18 U.S.C. 1304—*Broadcasting Lottery Information*

"Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[2] In adding the issue, the Board refused Cosmopolitan's request that a determination of meritorious programming be made "particularly with regard to programs designed to serve the needs and tastes of ethnic minorities within the station's service area." The Board noted such programs "do not automatically qualify as meritorious because they have been 'designated' to service the needs and tastes of ethnic minorities."

Nash (Judge) concluded Cosmopolitan had operated its broadcast facility so as virtually to relinquish all interest and control over the station's programming to time brokers, religious broadcasters and commission salesmen. He therefore concluded Cosmopolitan lacked the requisite qualifications to remain a licensee, and accordingly proposed denial of Cosmopolitan's renewal application. After a careful review of the record, Cosmopolitan's exceptions to the Initial Decision, the parties' pleadings, and having heard oral argument, we conclude the Judge's findings of fact and conclusions of law are sound, supported on the record as a whole, and fully consistent with Commission policy. Except as modified in this Decision and in our rulings on exceptions contained in the appendix, Judge Nash's findings and conclusions are adopted.

4. Because we agree the record fully supports Judge Nash's findings, we will not set out the full details of Cosmopolitan's negligent supervision. However, we shall outline Cosmopolitan's performance during the license term in order to emphasize the full scope of its abdication of control.

5. The primary reason for Cosmopolitan's lack of control and supervision over programming and operations is readily apparent: virtually every available minute of broadcast time on WHBI was sold to time brokers, who either provided programming or resold smaller blocks of time to subbrokers.[3] As a result of its abdication of licensee responsibility, numerous violations of Commission Rules occurred, including (but not limited to) the promotion of a lottery, false and misleading advertising, improper logging, failure to meet filing re-

[3] WHBI was originally established as a Black-oriented station. Its Black format proved financially unsuccessful, and WHBI's programming is now primarily foreign language and ethnic. The predominant language is Italian, but a total of over 20 different European and Asiatic languages are represented.

quirements, and inadequate record keeping. To quote Judge Nash, all this resulted from "a maximum resale of time and a minimum of control over how that time was actually used." (I.D., conclusion 34).

6. The Commission allows licensees to engage in time brokering, but not without the caveat that extensive time brokering might result in the licensee's relinquished or diminished control over programming. *See In re Clarifying Paragraph (c) of Section 1.613, Concerning the Filing of Agreements Involving the Sale of Broadcast Time for Resale*, 33 FCC 2d 653 (1972). A broadcast licensee must retain control of its facility. This control includes ascertaining the needs and interests of the listening public and formulating responsive programming. *Allen T. Simmons*, 3 R.R. 1029 (1947). In our *Fairness Report*, 48 FCC 2d 1 (1974), *reconsidered* FCC 76-265, —— FCC 2d —— (Released March 24, 1976), we again emphasized the long-standing policy that responsibility for selecting program material lies with the licensee. "That responsibility 'can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments.' *Report on Editorializing*, 13 FCC at 1248." *Id.*, at 10. In *United Broadcasting Company of New York*, 4 RR 2d 167, 173 (1965), we pointed out that, even with time brokerage contracts, "It is, of course, the licensee's obligation to retain control over programming content at all times." See generally, *Metropolitan Broadcasting Corp.*, 8 FCC 557 (1941). We repeated this standard in *Welcome Radio, Inc.*, 20 FCC 2d 582 (1969).

7. It is fully evident from the record that Cosmopolitan did not ". . . retain control over program content at all times." On the contrary, it hardly retained any control at all as demonstrated by its general lack of

awareness of program content or even of who presented much of the station's programming. Cosmopolitan outlined a procedure whereby its president, Donald Lewis (Lewis),[4] met with potential time brokers, screened their broadcasts, and maintained an ongoing relationship—checking programming and proposed subjects of audience interest. In reviewing the record, however, we agree with Judge Nash's conclusion that ". . . there is no evidence that any substantial effort is made to check backgrounds independently of . . . interviews [with prospective time brokers] (I.D., conclusion 7) and that ". . . Lewis' internal procedures to meet the standards which the Commission directed be observed [for familiarity with foreign language broadcasts] are, at best, minimal." (I.D., conclusion 10).[5] We agree with Cosmopolitan's contention that its conduct with regard to foreign language programming is to be gauged by our 1967 and 1973 *Policy Statements*, but this is not to say that Cosmopolitan's implementing procedures met the standards under which the Commission expects a licensee to retain effective control over station operations. The Commission recognized the difficulty and expense involved in requiring licensees airing foreign language broadcasts to employ monitors familiar with all the languages broadcast. In the 1973 Policy Statement, *Foreign Language Programs*, 39 FCC 2d 1037 (1973), we suggested guidelines relaxing existing requirements, which left "to the licensee the determination of what particular procedures

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[4] Donald J. Lewis has been the owner, president, treasurer, and a director of Cosmopolitan since 1964. WHBI's station staff consists of Lewis, a station manager, Lewis' secretary, and five operators who hold third class FCC licenses. Lewis has complete charge over policy operations, and all sales of broadcast time. No sales or production staff is employed, and WHBI makes no effort to sell commercial time.

[5] While approximately 68% of WHBI(FM)'s programming is in foreign languages, Lewis is fluent only in English.

are in his case necessary to the exercise of proper control over programming." *Id.*, at 1042. But, at the same time, we reminded licensees of the responsibility attaching to this discretion to maintain "a familiarity with the content of his programs." *Id.* at 1041. Cosmopolitan argues it satisfied Commission requirements by using monitors, fluent in specific languages, who filed written reports on foreign language programs. But the record discloses monitors only reported whether commercials were broadcast as listed and did not evaluate substantive program content. Cosmopolitan claims it pointed out certain prohibited practices—use of obscenity, slander and libel, violations of the fairness doctrine, and broadcast of lottery information—which it felt monitors should be aware of. Yet, by its own admission, it did not instruct prospective monitors in formal Commission requirements, opting instead for a "Memorandum," in English, containing a simplified summary of "objectionable material" which should be reported to the station. We believe the record amply supports the Judge's finding that ". . . evidently none of the monitors [had] direct knowledge of FCC Rules." (I.D., finding 34).

8. The instant proceeding presents a situation in which the licensee may have been aware of who was broadcasting in foreign languages but, because of inadequate and ineffective procedures, was unable to ascertain program content or to maintain the requisite familiarity with program content. In the case of English language programs, the licensee often did not know who was broadcasting over WHBI (or, if it did, it chose not to maintain even a minimum of control). The only reasonable conclusion which can be drawn from Cosmopolitan's performance is that management failed to exercise control over WHBI's programming.

9. Cosmopolitan alleges the Commission was apprised of WHBI's operation and gave its approval thereto. In

support of this claim it refers to several letters sent to us during 1966-68. However, these letters did not go into the detail now attributed to them. While certain letters advised the Commission of Cosmopolitan's implementing procedures for monitoring foreign language broadcasts, the details were not explicit, and provide no basis for claiming Commission "approval." In addition, some policies and procedures outlined in other letters were discontinued without further notice by Cosmopolitan. Cosmopolitan contends the Commission "explicitly sanctioned" WHBI's operation as a foreign language specialty station by granting permission to relocate its main studio from Newark to New York City. But this permission affords no basis for claiming we intended WHBI to sever its relationship with Newark, which remained the city of license. In fact, Cosmopolitan's contentions that the Commission was either fully apprised of WHBI's *modus operandi*, or that we gave explicit permission to such operations, by approving relocation of the station or otherwise, are unfounded on the record.

10. Cosmopolitan's lack of control over WHBI is further evidenced by the manner in which certain English-language programming, specifically "Kaleidoscope" was promoted.[6] While none of the specific commercials which were broadcast were submitted into evidence, a taped announcement, which was identified by Kaleidoscope's producer (Dean Lewis) as "similar in content to those

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[6] Broadcast during early morning hours, "Kaleidoscope" actually consisted of individual programs of from five to sixty minutes duration, produced by persons buying time from Dean Lewis. Through various entities, the names of which have changed over the years, Dean Lewis has purchased time from WHBI, and resold that time to persons desiring to become involved in broadcasting. The transcript of a sample commercial promoting "Kaleidoscope" is reproduced in the Initial Decision (FCC 74D-41) at page 19. Dean Lewis is not related to Cosmopolitan's president, Donald Lewis.

broadcaset over WHBI," goes beyond mere puffery. The omission of information was more misleading than what was actually broadcast. These omissions included the failure to disclose that Radio Broadcast Associates—a Dean Lewis alter-ego which purported to train individuals, for a fee, for careers in broadcasting—was sponsoring the request for announcers and disc jockeys (rather than WHBI, as implied), and the failure to disclose that RBA was running a quasi-training school and not hiring employees. WHBI's studio telephone number was given in the commercials, and for a time the WHBI call letters were prominently displayed at RBA's offices. All of these omissions lent added color to the deception that WHBI was running Kaleidoscope. We cannot ignore Judge Nash's findings regarding the promotion of material broadcast over WHBI in evaluating WHBI's performance. Donald Lewis permitted—indeed in several instances aided—the promotion of Dean Lewis' various enterprises by doing nothing to dispel the impression that Cosmopolitan, WHBI, Kaleidoscope and Radio Broadcast Associates were either closely associated or one and the same.

11. Cosmopolitan readily admits its failure to timely file changes of officers and ownership, various contracts, and to satisfactorily maintain its political broadcast file. It seeks to justify these breaches of Commission Rules as the result of unfamiliarity, misinterpretation, and general confusion engendered by the bankruptcy of its primary English-language time broker. While appropriate corrections were made in each instance, gross violations did occur and the licensee was remiss in discharging its duties. In effect, Cosmopolitan contends half compliance is better than none at all, and some credit should be given for attempts to comply. However, we cannot accept such incomplete compliance. Standing alone, these repeated violations may not warrant denial of renewal, but they supply further, cumulative evidence

of Cosmopolitan's overall failure to exercise adequate control over WHBI's operations.

12. Finally, in violation of the Communications Act and the criminal law of the United States, Cosmopolitan allowed a lottery to be promoted over WHBI.[7] The licensee contends this television "giveaway" was not a lottery, but we fail to see how a contrary conclusion can be avoided. Cosmopolitan's argument is founded on the fact that the broadcaster, Richard Sugar, offered free boxes of rice to listeners who requested them, and 400 free boxes were eventually given away. In addition, Cosmopolitan states the prizes (two television sets) were provided by the sponsor, Carolina Rice, and not the promoter—Sugar.

13. First, the identity of the prize supplier is of no particular decisional significance: prizes were provided. Second, the fact that 400 free boxes of rice were distributed, taken in the context of the promotion, does not remove the element of consideration. Since any Carolina Rice box top was acceptable, it can be concluded that at least some people purchased rice and sent in boxtops for a chance to win the television sets. Thus, given prize, chance and consideration, a lottery existed. To make matters worse, this lottery was the subject of frequent promotional announcements, some of which were heard

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[7] See n. 1, *supra*. During April and May 1972, Richard Sugar, who conducted a nightly Latin American program, devised a promotion in conjunction with his sponsor, Carolina Rice. He offered a free box of rice to all listeners who requested one. He also persuaded the sponsor to provide two television sets to be given away at a drawing held at a specified dance. To participate in the drawing, a listener had to write his name and address on a Carolina Rice box top and send it to Sugar. Commission employees called the station during the period of announcements, and on inquiry were informed facsimiles could not be used in place of actual box tops.

by station personnel.[8] These announcements were allowed to continue unchallenged, and further support a conclusion that licensee supervision over station operations was lacking.

14. In seeking to retain its license for WHBI, Cosmopolitan argues its programming was not only "meritorious" but, by virtue of its foreign language format, was meritorious *per se*. We fully agree it is commendable for a licensee to provide service to ethnic minority groups within the community. See *Foreign Language Programs*, *supra*, at 1039. In this connection, however, we agree with Judge Nash's conclusion that WHBI's particular programming does not warrant any finding of special merit. While Cosmopolitan alleges some programming responsive to the meritorious programming issue, it was not able to substantiate this claim from program logs submitted in evidence.

15. In addition, WHBI's English language programming was unresponsive to obligations imposed on a licensee. Cosmopolitan contends its weekly broadcast of a 15-minute interview with community leaders, and its airing of certain taped messages provided by the Newark Health Department, satisfied its community service obligations. This contention evidences a woeful lack of understanding respecting a licensee's duties. Cosmopolitan maintained neither production nor news staffs and presented no licensee-originated programming, including news and public affairs programming responsive to community needs and interests. Neither did Cosmopolitan introduce any evidence that WHBI maintained a visible

[8] Lewis heard the promotional announcements, and testified he thought Sugar was asking for tops from the boxes of rice he had given away. The engineer on duty when some contest announcements were broadcast recalled "hearing something about a box top." Although he had specific instructions relating to contests, it did not occur to him this might be a lottery.

presence in its city of license, or any other area for that matter. In fact, Douglas Eldridge, formerly a *Newark News* reporter for fifteen years, eight of which were spent covering Newark urban affairs, and presently an editor in the Mayor of Newark's Public Information Office, testified he never heard WHBI mentioned by any political or community leaders in Newark, nor did he ever see representatives of the station present at events of importance. Given this, we agree with Judge Nash that it may safely be concluded WHBI was a "non-factor" in community affairs.

16. The denial of renewal proposed by Judge Nash is based on a persistent course of conduct which ignores the principles of operation of a broadcast facility in the public interest. Cosmopolitan abdicated its responsibility for programming by selling virtually all available time to brokers, and it abdicated its responsibility to maintain control over such programming. It failed in significant respects to comply with the rules and standards governing operating procedure for a licensee. When WHBI's defective operations are viewed in their entirety, they provide ample support for Judge Nash's conclusion that the only consideration in the operation of WHBI was Donald Lewis' desire to maximize profit and minimize cash outlay.

17. Given the magnitude and frequency of violations demonstrated on this record, we feel the public interest would be best served by denial of WHBI's application for renewal of license. We deny renewal here only after a detailed review of the record and because we see little to indicate that Cosmopolitan is prepared to assume its obligation of responsible supervision at WHBI.

18. ACCORDINGLY, IT IS ORDERED, That the above-captioned application of Cosmopolitan Broadcasting Corporation for renewal of license of Station WHBI-FM, Newark, New Jersey, IS DENIED.

19. IT IS FURTHER ORDERED, That the "Motion of Cosmopolitan Broadcasting Corporation to Correct Transcript of Oral Argument," filed on December 17, 1975, IS GRANTED.

20. IT IS FURTHER ORDERED, That Cosmopolitan Broadcasting Corporation IS AUTHORIZED to continue to operate the station until 12:01 a.m., September 1, 1976 to enable the licensee to conclude the station's affairs; PROVIDED, HOWEVER, That if the licensee seeks judicial review of our Decision, it is authorized to continue to operate Station WHBI-FM until thirty (30) days after final disposition of such appeal.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Rulings on Exceptions of Cosmopolitan Broadcasting Corporation

Exception No.	*Ruling*
1	*GRANTED.* To the extent that WHBI's main studio was relocated to 80 Riverside Drive, New York City, pursuant to Commission grant of Cosmopolitan's application for waiver of the main studio rule [Section 73.210 (a)(3) of the Rules] on January 9, 1969, and DENIED in all other respects.
2	*DENIED.* The requested finding is redundant. See paragraph 15 of the Initial Decision.
3, 7, 8, 11, 12, 40, 55, 69	*DENIED.* The ALJ's findings are supported by the evidence of record.
4, 19, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 42, 43, 47, 53, 54, 56, 58	*DENIED.* The ALJ's findings accurately reflect the evidence of record. The proposed findings are of no decisional significance.
5	*DENIED.* The requested finding is of no decisional significance. Moreover, that Cosmopolitan maintains no formal production staff, and whatever production facilities maintained at the station were for the benefit of time brokers, is fully supported by the record.
6	*DENIED,* as redundant and of no decisional significance. See finding 13 of the Initial Decision.
9	*DENIED.* The proposed finding is redundant and of no decisional significance. The cited finding is relevant for the reason stated in Finding 15, n. 7, of the Initial Decision.
10	*GRANTED,* to the extent Mr. Antonoff's testimony indicates his weekly charges totaled approximately $1,300. However, Cosmopolitan did not furnish actual costs incurred by individ-

Exception No.	*Ruling*
	ual time brokers, and Judge Nash's finding of an $80 per hour rate is a reasonable approximation and not inconsistent with the record.
13	*DENIED.* The Initial Decision accurately reflects the evidence of record. The requested finding is redundant. See Findings 18-19 of the Initial Decision.
14, 16, 17, 77	*DENIED.* The Initial Decision accurately reflects the evidence of record. The requested findings are argumentative and unsupported by the record.
15	*DENIED.* The Initial Decision accurately reflects the evidence of record. The requested findings are redundant.
20, 21	*DENIED.* The requested findings are redundant. See Findings 101-102 of the Initial Decision.
23	*DENIED,* as of no decisional significance. It is the licensee's responsibility to properly supervise and oversee the operation of its facility.
37	*DENIED.* The finding excepted to accurately reflects the evidence of record. The exceptions are argumentative and based upon speculation. The proposed findings are argumentative and of no decisional significance.
39	*DENIED,* as argumentative and of no decisional significance. A broadcast licensee has an affirmative mandate to monitor information transmitted over its facility. The failure to remove, or refuse to broadcast, objectionable or illegal material is indefensible.
41	*DENIED.* The finding excepted to is fully supported by the record. Dean Lewis, principal of PBA, recorded the tape entered into evidence, and identified it as "similar in content

Exception No.	*Ruling*
	to those broadcast." (See Tr. 2551, 2553). The proposed findings are of no decisional significance. RBA's promotion goes beyond mere puffery, and the omission of information as to the separate identities of Cosmopolitan and RBA added color to the deception that WHBI was running "Kaleidoscope."
44, 45, 48, 49, 50, 51, 52, 57, 58, 61	*DENIED*, as argumentative and of no decisional significance.
46	*GRANTED*, to the extent the FTC complaint dealt only with RBA's newspaper advertising, and *DENIED* in all other respects.
59	*DENIED*, in light of our Decision herein. At issue is not whether WHBI's time brokers purportedly were instructed to report requests for political time, but whether the licensee accurately and adequately kept records in compliance with Commission Rules.
60	*DENIED*, as redundant and of no decisional significance. See Findings 103-106 of the Initial Decision.
62	*DENIED*. The finding excepted to accurately reflects the evidence of record. The proposed finding is inaccurate, argumentative and of no significance in light of our Decision. See paragraph 8 of the Decision.
63, 64	*DENIED*. The requested findings are of no decisional significance for the reasons stated in Conclusion 26 of the Initial Decision.
65	*DENIED*. The Initial Decision accurately reflects the evidence of record. See Findings 115-117 of the Initial Decision.
66, 67	*DENIED*, as argumentative and of no significance in light of our Decision herein.

Exception No.	*Ruling*
68	*DENIED.* The proposed finding is inaccurate, argumentative and of no decisional significance. The record does not support an allegation that any "project" or concerted effort on the part of Commission personnel was undertaken for the purpose of gathering derogatory information against WHBI.
70	*DENIED.* The Initial Decision accurately reflects the evidence of record. The proposed finding is inaccurate, argumentative and of no decisional significance. Rule 1.282 defines "news programs" as reports dealing with *current* local, national and international events. Prerecorded programs, of the nature broadcast over WHBI, while perhaps dealing with matters of interest, are by their nature not particularly current, and are more properly classified as "informational" matter rather than news. Well over one-third of the programming logged as news in exhibits introduced into evidence by Cosmopolitan consisted of such taped matter.
71	*DENIED.* The cited findings are adequately supported by the record. The proposed finding is argumentative and inaccurately characterizes evidence concerning foreign language programming on WHBI. Further, the exception dealing with the ALJ's rejection of WHBI Exhibit No. 54 is also DENIED, as of no decisional significance.
73, 74	*DENIED.* The findings excepted to accurately reflect the evidence of record. While Cosmopolitan was granted permission to relocate its main studio to New York City, its minimal contacts with Newark, New Jersey, the city of license, are relevant, and are at the crux of this proceeding.

Exception No.	*Ruling*
75	*DENIED.* The Initial Decision accurately reflects the evidence of record. The proposed finding places undue emphasis on a relatively minor portion of WHBI's programming efforts, and inferentially attributes a programming or production role to station management when such was not the case.
76	*GRANTED,* to the extent WHBI's General Manager, Alan Collins, produced a weekly 15-minute public affairs program. The suggested finding is DENIED as argumentative and of no decisional significance.
78, 80	*DENIED.* The cited conclusion is fully supported by the evidence of record.
79	*DENIED.* The cited conclusions are fully supported by the evidence of record. The proposed conclusion is argumentative, inaccurately characterizes the evidence, and is unwarranted based on the entire record concerning abdication of licensee control. Cosmopolitan appears to have confused its responsibilities with its authority—authority may be delegated to others, but the licensee must assume ultimate responsibility for the operation and control of its facility.
81, 83, 96	*DENIED.* The cited conclusion is fully supported by the evidence of record. The requested conclusion is argumentative and unsupported by the record.
82	*DENIED.* The cited conclusion is supported by the evidence of record. The requested conclusions are argumentative, and of no significance in light of our Decision. See paragraph 7 of the Decision.

Exception No.	*Ruling*
84	*DENIED.* The ALJ's conclusion is fully warranted by the record, and consistent with Commission policy. The first and second paragraphs of the proposed conclusion are unsupported by the record. See paragraphs 7 and 12, n. 8, of the Decision. The third paragraph of the proposed conclusion is also unsupported by the record. See paragraph 8 of the Decision.
85, 87, 88, 89, 90, 95	*DENIED.* The cited conclusions accurately represent the evidence of record. The proposed conclusions inaccurately characterize the evidence, and are of no decisional significance.
86	*DENIED.* The ALJ's conclusions are fully warranted on the record, and are in no way inconsistent with Commission policies, rules, or decisions. The proposed conclusion is speculative and of no decisional significance in view of our Decision. The motivation of Donald Lewis to sell broadcast time on his facility to time brokers is of no import—that he abdicated control over his facility to those brokers is the matter at issue.
91	*DENIED.* The ALJ's conclusions are fully warranted by the record and consistent with Commission policy. The proposed conclusion inaccurately characterizes the evidence of record concerning Cosmopolitan's control over the operations of time brokers utilizing its broadcast facility, and is of no decisional significance.
92, 93, 94, 98	*DENIED.* The cited conclusions are fully supported by the evidence of record. The proposed conclusions are of no decisional significance in light of our Decision. See paragraph 11 of the Decision.

Exception No.	*Ruling*
97	*DENIED.* The ALJ's conclusions are fully warranted by the record and are in no way inconsistent with Commission policies, rules or decisions. The proposed conclusion inaccurately characterizes the evidence of record. See paragraph 9 of the Decision.
99	*DENIED.* The cited paragraph accurately reflects the evidence of record. The proposed conclusion is entirely inconsistent with the record, and Commission policy, rules and decisions.
100	*DENIED.* The ALJ's conclusion is fully warranted by the record. The proposed conclusion is unwarranted based on the entire record concerning Cosmopolitan's foreign language operations. See paragraph 14 of the Decision.
101	*DENIED.* The cited conclusion is fully warranted on the record and in light of our Decision herein. See paragraph 15 of the Decision.
102, 103	*DENIED.* The ALJ's conclusions in the cited paragraphs are fully warranted on the record, and are in no way inconsistent with Commission policy, rules or decisions. See paragraph 16 of the Decision.
104	*DENIED.* The ALJ's ultimate conclusion is fully supported on the record as a whole. See paragraph 17 of the Decision.

APPENDIX E

Programming, Foreign Language
Renewal, Of License, Denied Or Dismissed
Time Brokerage

Petition for reconsideration of foreign language station renewal application denial (59 FCC 2d 558) denied. No factual basis shown for rehearing. Record supports previous conclusion that licensee had abdicated control of programming to time brokers, and justifies renewal denial rather than lesser sanctions imposed on foreign language b/cers in other proceedings.

F.C.C. 76-891

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket Nos. 19657
File Nos. BRH-1359
BRSCA-746

In Re Application of

COSMOPOLITAN BROADCASTING CORPORATION,
NEWARK, NEW JERSEY

For Renewal of License for Station WHBI-FM

MEMORANDUM OPINION AND ORDER

(Adopted: September 28, 1976;
Released: October 14, 1976)

BY THE COMMISSION: COMMISSIONERS FOGARTY AND WHITE NOT PARTICIPATING.

1. Before us for consideration are: (a) a petition for reconsideration of our Decision in *Cosmopolitan Broadcasting Corporation* (59 FCC 2d 558 (1976)), denying

the above-referenced renewal application, filed July 2, 1976, by Cosmopolitan Broadcasting Corporation (hereinafter "Cosmopolitan"); (b) the Broadcast Bureau's opposition to said petition for reconsideration, filed July 15, 1976; and (c) Cosmopolitan's reply to the Broadcast Bureau's opposition, filed July 27, 1976.

2. A matter of particular relevance here is the fact that WHBI's format is devoted almost exclusively (approximately 68%) to foreign-language programs, which are presented by time brokers. On the basis of findings and conclusions made after hearing, former Administrative Law Judge Ernest Nash concluded Cosmopolitan had operated its station so as virtually to relinquish all control over the station's programming to time brokers, religious broadcasters and commission salesmen. In Judge Nash's view, Cosmopolitan lacked the requisite qualifications to remain a broadcast licensee, and he accordingly proposed denial of Cosmopolitan's renewal application. Following review of exceptions to the Initial Decision, the Commission unanimously affirmed the Judge's findings and conclusions, and denied renewal, 59 FCC 2d 558 (1976).

3. Cosmopolitan's lengthy petition for reconsideration is premised on the theory that the Commission was so profoundly influenced by the negative implications and "evils" of time brokerage that it was prevented from properly evaluating the record evidence adduced under the hearing issues. Proceeding from this premise, Cosmopolitan makes four major arguments: Cosmopolitan did not abdicate control over WHBI's programming and operations, the Commission ignored evidence respecting the meritorious nature of WHBI's foreign language programming, the Commission erred in concluding WHBI's English-language programming was unresponsive to obligations imposed on a licensee, and the Commission improperly concluded there was little basis to indicate

Cosmopolitan was prepared to assume its obligations of responsible supervision of WHBI.

4. At the outset, we note that to a considerable extent, Cosmopolitan's petition merely reiterates its own argumentative version of the facts and legal arguments already considered and rejected by both Judge Nash and this Commission. In accordance with our long-standing rule that rehearing will not be granted merely to permit reargument of matters already fully considered and passed upon by the Commission, we will reject Cosmopolitan's arguments which fall in this category.[1] *United Television Company, Inc.*, 37 RR 2d 503 (1976). In our judgment, the record fully supports our conclusion that for all practical purposes, Cosmopolitan relinquished virtually all control over the station's programming to time brokers, and thus was not qualified to remain a licensee. Accordingly, there is no "manifest error or omission" present which would justify rehearing. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co.* v. *FCC*, 122 U.S. App. D.C. 127, 351, F.2d 824 (1965).

5. Cosmopolitan's major argument is devoted to the claim it did not abdicate control and supervision of WHBI's programming and operations. Cosmopolitan contends our conclusion it relinquished control over programming rests solely on two facts which merely beg the question of whether the licensee retained effective

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[1] We have in mind here particularly arguments directed to our rulings on Cosmopolitan's exceptions and to our Order (FCC 75-1327), released December 8, 1975, rejecting charges that an article in the December 1, 1975 issue of *Television Digest* indicated this case had been "decided" before oral argument. However, as Cosmopolitan correctly notes, we failed to rule on its Exceptions Nos. 18 and 72. While we earlier considered these exceptions they were inadvertently omitted from the listing of exceptions in the Appendix to the Decision. These exceptions are ruled on below in Fn. 2 and Par. 8, respectively.

control: Donald Lewis' lack of fluency in any foreign language, and the fact foreign language producers (and not Lewis) select material to be broadcast.[2] This argument is without merit. By focusing narrowly on Par. 7 of the Decision Cosmopolitan ignores the overall basis for our conclusion, which rests on the findings and conclusions of Judge Nash, which we adopted (Par. 3, Decision). Moreover, our conclusion respecting relinquishment of control over programming does not rest solely on the two bases asserted above by Cosmopolitan, but on the *totality* of the licensee's *modus operandi*. This becomes fully evident when the Decision is considered in its entirety, as it must be.

6. For the same reason, we find the remainder of Cosmopolitan's argument respecting the relinquishment of control (Petition, pp. 9-12) unconvincing. By again focusing selectively on the Decision, Cosmopolitan conveniently ignores the other significant shortcomings of its operations (Decision, Pars. 5, 10-13, and 15-17) which, considered in conjunction with the demonstrated ineffectiveness of its supervision over foreign-language programming, amply support the conclusion Cosmopolitan effectively relinquished control over WHBI's programming and operations. Additionally, the arguments here are essentially a rehash of matters which were fully presented to and considered earlier by the presiding judge and the Commission, and which were found wanting in substance.[3]

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[2] Cosmopolitan's Exception 18 to the Initial Decision, which is pertinent to the argument here, is denied as having no decisional significance. Whether some foreign language programs were produced by time brokers at WHBI's studios or whether they were taped is not decisive. What is decisive is the ineffectiveness of the procedures used by Cosmopolitan to maintain control over programming content.

[3] In its brief in support of exceptions (Brief, pp. 12, 27), Cosmopolitan argued its conduct respecting foreign-language programs

7. Cosmopolitan next argues our conclusion that WHBI's programming did not warrant a finding of special merit is at odds with the evidence. This argument is equally without merit because petitioner erroneously focuses on a single paragraph (Par. 16) of the Decision. Cosmopolitan bore the burden of proof on the meritorious programming issue, and, as noted in Pars. 14 and 15 of the Decision, the evidence introduced by Cosmopolitan was insufficient to meet its burden. It was unable to substantiate its claim of programming responsive to the meritorious programming issue from program logs. Its weekly broadcast of a 15-minute interview with community leaders, and its airing of certain taped messages provided by the Newark Health Department were insufficient to establish meritorious programming. Indeed, as we noted in Par. 15 of the Decision, Cosmopolitan's reliance upon these programs to demonstrate satisfaction of its community service obligations demonstrated "a woeful lack of understanding respecting a licensee's duties." In addition, despite repeated requests by Judge Nash, Cosmopolitan failed to introduce any persuasive evidence directed to the meritorious programming issue. See Pars. 10 and 11, *infra*. See also Initial Decision, Pars. 124-134 and Conclusions 30-32. Having found WHBI's programming did not warrant special merit on the basis of these considerations, the Commission had

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was to be gauged under the 1967 (9 RR 2d 1901) and 1973 (39 FCC 2d 1037) Policy Statements respecting foreign language broadcasts, a point we noted in Par. 7 of the Decision. Cosmopolitan now suggests in its Petition that if it is to be judged strictly under the 1973 standards, it must be afforded a further hearing to present evidence on improvements in supervisory procedures made after the 1973 statement. It is evident this change in positions is little more than an effort to create an artificial basis for rehearing. Petitioner's suggestion lacks merit, because the 1967 Policy Statement sets forth standards for foreign-language broadcasts, which were explicitly reaffirmed (39 FCC 2d 1039, Par. 9) in our 1973 clarifying Policy Statement.

no reason to consider the programming service as a mitigating factor when, on the basis of the whole record, it determined in Par. 16 of the Decision that Cosmopolitan had abdicated its responsibilities as a licensee.

8. Under this same argument, petitioner complains we did not consider all the evidence respecting the value of its ethnic programming, and particularly the summarization of expert testimony on this point contained in Cosmopolitan's Exception No. 72. As noted above, that exception was overlooked in our rulings on exceptions. Exception 72 takes issue with Judge Nash's finding which characterized the testimony of Cosmopolitan's expert witnesses on the value of foreign language programs ". . . as providing expert opinion to the effect that foreign language or ethnic programming is a good thing, generally speaking." (I.D., Par. 129). That exception further takes issue with the Judge's failure to make additional findings based on the testimony of persons such as Dr. Margaret Mead, Dr. Mario Pei, Professor Gordon Erikson and others respecting the sociological and public importance of ethnic programming. We have carefully considered this exception, but we are not persuaded that it alters our judgment that WHBI is not entitled to a finding of special merit for its programming. We have no quarrel with the general proposition that ethnic programming serves an important purpose. In fact, as Judge Nash pointed out, (I.D., Conclusion 31), expert advice on this matter was unnecessary, because the Commission has long been aware of the salutary public service of foreign language broadcasts (see 39 FCC 2d 1039) and we again stated as much in Par. 14 of the Decision. But in continuing to argue in effect that foreign language programming is *per se* meritorious, Cosmopolitan would have us totally ignore the record in this proceeding and the public policy requiring licensee responsibility. That we will not do, because as we pointed out in the 1973 Policy Statement (39 FCC 2d at 1039), "[w]e

cannot carve out in this area [of foreign language broadcasts] a special exception to licensee responsibility." Accordingly, Exception 72 is denied because Judge Nash correctly evaluated the weight to be given expert testimony in this context.[4]

9. Petitioner next argues our conclusion (Decision, Par. 15) that WHBI's English language programming was unresponsive to obligations imposed on a licensee is based on scant evidence and therefore erroneous. For the reasons stated in our Decision, we adhere to our judgment that WHBI was a "non-factor" in community affairs. Nevertheless, we consider Cosmopolitan's arguments that Cosmopolitan did not have specific notice under the hearing issues that its service to Newark was in issue, and that in his rulings (Tr. 2420-21), Judge Nash agreed with this view. As with its other arguments, Cosmopolitan insists again on looking at only isolated portions of the record. Thus, when petitioner argues that if Judge Nash was wrong in ruling WHBI's service to Newark was not in issue, Cosmopolitan should not be penalized for relying thereon, it totally ignores later statements by the Judge which make it clear that under the meritorious programming issue (which we considered in *both* Pars. 14 and 15 of our Decision), he considered WHBI's service to its community of license cru-

[4] The suggestion (Petition, Fn. 14) that Cosmopolitan was precluded from getting into evidence the views of ethnic group leaders and ordinary members of ethnic groups is without merit. Such views were contained in affidavits offered by Cosmopolitan, but rejected on the basis of the Broadcast Bureau's objection that the affiants should be made available for cross-examination. Cosmopolitan's stated reason for not producing the affiants was the alleged difficulty of getting the affiants to Newark to testify during their working hours. This reason is totally unpersuasive, particularly in view of the relative proximity of New York City to Newark. And in view of the profitability of Cosmopolitan's operations (I.D., Par. 15), we cannot accept any implied plea that financial hardship precluded making arrangements to bring the affiants to Newark.

cial. This is fully evident from exchanges between Judge Nash and petitioner's counsel in cross-examination of Douglas Eldridge, whose testimony is referred to in Par. 15 of the Decision.

10. The theory under which Judge Nash permitted Eldridge to testify was that in view of the latitude earlier afforded Cosmopolitan to establish the merit of its ethnic programming, the Bureau should be afforded a similar latitude in proving lack of merit. (Tr. 2497-8). The gist of Eldridge's testimony on direct was that in his view, WHBI had played no significant role in covering Newark affairs. That counsel for Cosmopolitan considered this testimony potentially devastating is clear from his cross-examination of Eldridge. Under this issue, Judge Nash was concerned not only with programming offered to ". . . Macedonians, Hungarians and Greeks, Italians, Spanish [and] Argentinians) (Tr. 2511), but also with WHBI's involvement in community life. During colloquies between Judge Nash and Cosmopolitan's counsel during cross-examination of Eldridge, the Judge repeatedly challenged Cosmopolitan to come forward with some kind of *evidence* (instead of argument) as to WHBI's community service. He noted if such evidence existed and was not put into the record, Cosmopolitan's presentation would be "deficient." (Tr. 2509). Just as he earlier stated he would welcome ". . . any evidence of participation by WHBI in the affairs of . . . Newark" (Tr. 2503), he later three times invited Cosmopolitan to produce solid testimony or evidence on this point. (Tr. 2512-14). And twice he pointedly told counsel that Eldridge's testimony could easily be "wiped out" by producing contrary testimony or evidence (Tr. 2513, 2516).

11. Considered in this context, the charge that there is an insufficient basis for concluding Cosmopolitan's English language programming was unresponsive to obligations imposed on a licensee is without merit. It is

fully apparent from Judge Nash's remarks that he was totally receptive to any evidence of WHBI's service to Newark. Some evidence on this point was subsequently introduced, as we recognized in Par. 15 of our Decision. See I.D., Pars. 132-133, and Decision, Par. 15. But this scant evidence does not outweigh other evidence respecting Cosmopolitan's "non-presence" in Newark (I.D., Par. 131), nor does it "wipe out" (to use Judge Nash's words) Eldridge's substantial testimony respecting the insignificant role WHBI played in community affairs. As Judge Nash put it, during a period of intense racial strife, WHBI ". . . made no contributions toward assisting those who undertook to achieve some measure of relief from the burdens borne by this unhappy community." (I.D., Conclusion 32). In view of all this, the conclusion that Cosmopolitan is not entitled to any special merit for its programming is fully justified.[5]

12. Cosmopolitan's final argument is that we erred in concluding there is little to indicate the licensee is prepared to assume its obligation of responsible operation, and that we have dealt unduly harshly with Cosmopolitan as compared to other foreign language broadcasters. A comparison of Cosmopolitan's brief in support of its exceptions to the Initial Decision against its present petition discloses the main thrust of petitioner's arguments here was presented to the Commission and rejected. We decline to discuss these arguments again, beyond referring petitioner to Par. 9 of the Decision. *United Television Co., Inc., supra.* However, the argument that we have dealt more harshly with Cosmopolitan

[5] It is idle to claim that when we granted WHBI's 1966 renewal application, the Commission knew that as a specialty station, WHBI intended to discharge its licensee obligations by serving special communities (i.e., ethnic audiences within the service area. Nothing in the statements made in the 1966 renewal application attachments (appended to Cosmopolitan's petition) disclosed the type of deficient operation which was uncovered at the hearing.

than other foreign language broadcasters is one which could not have been raised earlier. But the cases relied on by petitioner [6] are readily distinguishable because the time-brokered foreign language programs involved therein represented a relatively miniscule part of total programming, in contrast to the 68% of such programs broadcast by WHBI. Moreover, even the *Trans America* case (the only one to go to hearing) did not disclose the overall lack of supervision and other operational deficiencies shown here. It was precisely because of ". . . the magnitude and frequency of violations demonstrated on this record" (Decision, Par. 17) that renewal was denied. And this crucial distinction provides a rational basis for the differences in treatment, thus rendering *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (1965) inapposite.

13. Accordingly, IT IS ORDERED, That the petition for reconsideration, filed July 2, 1976 by Cosmopolitan Broadcasting Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

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[6] *Trans America Broadcasting Corp.*, 33 FCC 2d 596 (1972); *Birch Bay Broadcasting Co., Inc.*, 36 FCC 2d 500 (1972); and *Sierra Madre Broadcasting Co.*, 47 FCC 2d 424 (1974).

APPENDIX F

License, Renewal Of, see also Renewal Or Application
Licensee, Abdication Of Programming Control
Programming Meritorious

Where b/c license renewal application had been denied by FCC on abdication of control grounds, appellate court remanded case to FCC to decide if licensee's foreign language programming is sufficiently meritorious to warrant renewal. Amount of special programming is not enough to mitigate against denial of renewal. Docket No. 19657

FCC 79-873

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

Docket No. 19657
File Nos. BRH-1359
BRSCA-746

In Re Application of

COSMOPOLITAN BROADCASTING CORPORATION,
Newark, New Jersey

For Renewal of Main, Auxiliary & SCA
Licenses for WHBI (FM)

SUPPLEMENTAL DECISION

(Adopted: December 19, 1979;
Released: January 14, 1980)

BY THE COMMISSION:

1. By Decision released June 3, 1976, 59 FCC 2d 558, pet. for reconsideration denied, 61 FCC 2d 257 (1976), the Commission denied Cosmopolitan Broadcasting Corporation's application for renewal of its license to oper-

ate station WHBI-FM, Newark, New Jersey. Cosmopolitan sought review in the United States Court of Appeals for the District of Columbia Circuit, arguing that the Commission's decision was arbitrary and capricious. The Court upheld the Commission's conclusions that Cosmopolitan had virtually abdicated all control over the selection and content of its programming and had committed other violations,[1] but remanded this case to the Commission for further findings and conclusions on whether WHBI's programming was sufficiently meritorious to warrant renewal despite these violations. *See Cosmopolitan Broadcasting Corporation* v. *FCC*, 581 F.2d 917 (D.C. Cir. 1978).

2. The Court's remand order focuses on the Commission's conclusions regarding the merit of Cosmopolitan's foreign language programming. (At the time of its 1969 renewal application, Cosmopolitan devoted almost two-thirds of its program time to ethnic programming produced and presented by time brokers in 18 foreign languages.) In its decision, the Commission acknowledged the importance of a licensee's service to ethnic minority groups, but agreed with the Administrative Law Judge's conclusion that Cosmopolitan's particular foreign language programming did not warrant any finding of special merit. Thus, the Commission found that while Cosmopolitan alleged some foreign language programming responsive to the meritorious programming issue designated in this proceeding, Cosmopolitan was not able to substantiate this claim from program logs submitted in evidence. *Cosmopolitan Broadcasting Corporation*, 59 FCC 2d at 564. Additionally, the Commission adopted

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[1] The Commission found that Cosmopolitan had abdicated its responsibility as a licensee by selling virtually all its program time to brokers, and, in addition, had not maintained control over programming content. Other violations included the promotion of a lottery, broadcasting false and misleading advertising, improper logging, failure to meet filing requirements, and inadequate record keeping.

the Judge's findings that Cosmopolitan's foreign language programming consisted largely of ethnic musical entertainment and contained few public service elements. Paragraphs 127 and 128 of the Initial Decision.

3. The Court concluded that even though there was no substantiation from program logs, Cosmopolitan had offered a great deal of evidence concerning the content of its programming, and that the Commission's conclusion regarding program logs apparently ignored this evidence. Therefore, the Court remanded this proceeding to the Commission for a more reasoned consideration of the question whether the evidence of programming content in this proceeding was sufficient to establish the merit of Cosmopolitan's foreign language programming. In addition, the Court objected to a ruling by the Presiding Judge in which the Judge—refusing to accept a survey of the foreign language programming broadcast by other stations in Cosmopolitan's service area—made the following statement:

> . . . if the programming relied upon by WHBI is in fact meritorious, then it is in fact meritorious regardless of whether or not it is aired by any other station. If it is not meritorious, I do not think you can create merit in the programming by reason of the fact that no other station carries that particular language. Transcript at 2575.

The Court said that this ruling by the Presiding Judge was wrong as a matter of law: where there is a likelihood that a license may not be renewed, determination of the meritoriousness of programming must include consideration of the uniqueness of that programming to a significant segment of the public. The Court therefore directed the Commission to give due regard to this consideration in its deliberations concerning the meritoriousness of WHBI's programming.[2]

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[2] The court stated, however, that it expressed no view as to whether consideration of this factor would affect the Commission's

4. In accordance with the Court's instructions, the Commission has reviewed and reassessed the evidence (both proffered and accepted) of meritorious past programming. And it is again our determination that Cosmopolitan's programming was not sufficiently meritorious to mitigate the very serious and numerous adverse findings under other issues. In order to cure any inadequacy or ambiguity in our previous decision, we have clarified and amplified what weight the Commission accorded both program log and other evidence in assessing Cosmopolitan's foreign language programming. Second, we have considered the showing made by Cosmopolitan with respect to the uniqueness of its foreign language programming and, as the Court directed, determined what weight to accord such a showing under the meritorious programming issue.

5. As an initial matter it may be helpful to explain the Commission's general approach to meritorious programming. When the Commission permits a renewal applicant to offer evidence of meritorious programming to mitigate findings on issues that are potentially disqualifying,[3] the Commission's long-standing policy has been to

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ultimate determination of the meritoriousness of WHBI's foreign language programming or whether, even if meritorious, the seriousness of Cosmopolitan's other violations might be mitigated enough to deserve the imposition of a lesser sanction. 581 F.2d at 932.

[3] When character qualifications are in question, the Commission may consider mitigating evidence under the theory that the public interest is better served if the Commission's evaluation of the applicant's fitness to continue as a licensee includes consideration of favorable traits of the license as well as his deficiencies. See *Wagoner Radio Co.*, 12 FCC 2d 978 (Rev. Bd. 1968); see also *KFPW Broadcasting Co.*, 40 FCC 2d 126 (1973). Some forms of misconduct (e.g., misrepresentation, bribery, fraudulent billing) are *prima facie* so serious, however, that a grant would not be in the public interest no matter how meritorious the applicant's past programming record, and in such cases the Commission will not

give primary consideration to public service programming (i.e., news, public affairs and local programming) offered by the licensee, and to otherwise limit the scope of evidence which may be offered in mitigation.[4] This policy does not constitute a determination by the Commission that, aside from public service programming, there are no other factors relating to broadcast operation or programming, that have value or that affect the public interest. Rather, it reflects an effort by the Commission to focus primary attention on matters that are most likely to affect the ultimate outcome of the proceeding, taking into account the limited and specific purpose for which the mitigating evidence is offered, the fact that licensee misconduct serious enough to be disqualifying is in question, and the appropriate decisional weight to be accorded various public interest factors. Public service programming has been singled out for special consideration by the Commission under meritorious programming issues because such programming, as the "foundation stone of the American system of broadcast-

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even consider programming evidence as a mitigating factor. See *e.g., Immaculate Conception Church of Los Angeles* v. *FCC*, 320 F.2d 795 (D.C. Cir. 1963), cert. denied 375 U.S. 904 (1963); *United Broadcasting Co. of Florida, Inc.*, 60 FCC 2d 816 (1976); *KFPW Broadcasting Co.*, 40 FCC 2d 126 (1973); *Western Communications, Inc.*, 41 FCC 2d 581 (Rev. Bd. 1973).

[4] Evidence offered for mitigating purposes is limited to programming matters and may not include other forms of public service rendered by a licensee. See *Oil Shale Broadcasting Co.*, 52 FCC 2d 1167 (Rev. Bd. 1975); *Hertz Broadcasting of Birmingham, Inc.*, 45 FCC 2d 479 (Rev. Bd. 1974); *Western Connecticut Broadcasting Co.*, 26 FCC 2d 1019 (Rev. Bd. 1970); *Action Radio, Inc.*, 38 FCC 2d 489 (Rev. Bd. 1969). Though the Commission will permit the inquiry in such cases to encompass the entire programming format, the Commission has consistently given particular emphasis to public service programming. See *e.g., Star Stations of Indiana, Inc.*, 28 FCC 2d 488 (Rev. Bd. 1971); *Medford Broadcasters, Inc.*, 18 FCC 2d 817 (Rev. Bd. 1969).

ing," constitutes a most fundamental and basic aspect of programming service. *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1249 (1949), *Notice of Inquiry Re Formulation of Policies Relating to the Broadcast Renewal Applicant*, 27 FCC 2d 580, 581 (1971).

6. Consistent with the Commission policy outlined above, the meritorious programming issue in this proceeding was framed to give primary emphasis to the public service programming offered by Cosmopolitan, that is, "to determine whether the programming of Station WHBI(FM) has been meritorious, *particularly with regard to public service programs.*" (Emphasis added.) *Cosmopolitan Broadcasting Co.*, 39 FCC 2d 698, 699 (Rev. Bd. 1973).[5] This emphasis explains why the absence of program log evidence was and remains a serious deficiency in Cosmopolitan's showing. While program logs do not provide information on the specific content of programs in the various programming categories, and are certainly not conclusive with regard to the actual quality of programs broadcast, they provide the Commission with relatively reliable and precise information as to the amount of programming time a licensee has actually devoted to public service programming categories. Thus, when the Commission commented upon the failure of Cosmopolitan to substantiate from program logs its claim of programming responsive to the meritorious programming issue,[6] the Commission was referring to the

[5] In granting Cosmopolitan's request to add a meritorious programming issue in this proceeding, the Commission's Review Board specifically held that Cosmopolitan's foreign language programming would not be considered public service programming unless the programs actually contained the public service categories recognized by the Commission. Nor would Cosmopolitan's programming automatically be deemed meritorious solely because it was broadcast in a foreign language. 39 FCC 2d at 698.

[6] Cosmopolitan's foreign language programs were for the most part logged as entertainment programming. See Cosmopolitan's 1969 Renewal Application, Exhibit 3.

Judge's findings regarding news (one category of public service programming) in connection with Cosmopolitan's foreign language programs. Since the meritorious programming issue was framed to give particular consideration to public service programming, the absence of substantiating program log evidence was of primary significance and this was appropriately emphasized by the Commission.

7. The Commission's statement regarding program logs, however, was not meant to imply that it did not consider evidence other than that based on program logs in the determination of program merit. Indeed, in seeking to assess whether Cosmopolitan's foreign language entertainment programming contained public service "elements," it was necessary to look to non-log evidence [7] of programming segments of a public service nature such as announcements contained within entertainment programs.

8. Though Cosmopolitan attempted to adduce such information, primarily through the testimony of 15 producers of foreign language programs broadcast by WHBI,[8] that testimony in general related to little more than 18 out of more than 114 hours of foreign language and ethnic programming broadcast on WHBI per week.

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[7] Program logs list programs as to specific categories, not content.

[8] The program producers who testified in June and July of 1973 were attempting to substantiate the content of programs broadcast over WHBI prior to December 1972 at the latest at which time this proceeding was designated for hearing by an Order and Notice of Apparent Liability (FCC 72-1137, released December 19, 1972). See *e.g.*, transcript at 1434-35. (Evidence of meritorious programming adduced for purposes of mitigation would not have been relevant after the licensee learned his license was in jeopardy). See *Norjud Broadcasting, Inc.*, 55 FCC 2d 808 (Rev. Bd. 1975); *Chesapeake-Portsmouth Broadcasting Corp.*, 42 FCC 2d 1030 (Rev. Bd. 1973); *Medford Broadcasters, Inc.*, 18 FCC 2d 817 (Rev. Bd. 1969).

Moreover, the testimony was often vague and inconclusive as to both the amount of time devoted to and the precise nature of the non-entertainment programming segments.[9] Other evidence offered to show the content of WHBI's programming consisted of a general summary of the content of WHBI's foreign language programming (Exhibit 6), which the Court itself characterized as vague,[10] and a list of 75 guests (Exhibit 54) which even if it had been accepted as accurate and reliable,[11] and assuming that the topics discussed fell into categories of non-entertainment programming, still would not account for more than a miniscule amount of WHBI's programming time.[12] Despite Cosmopolitan's failure to adequately

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[9] There was difficulty in determining from the testimony of the program producers the actual amount of time devoted to news and public service announcements, not only because these matters were usually broadcast on an irregular basis, see transcript at 785, 1365, 1453, 1523, 1559, 1723, but also because it was many times unclear from the testimony whether the items broadcast actually were in the nature of the relevant categories of programming service. See transcript at 1428, 1464, 1468, 1723, 1751, 1762, 1764.

[10] 581 F.2d at 930. See also transcript at 1412.

[11] This Exhibit, which was rejected by the Judge, was prepared for the hearing by Donald Lewis, President of Cosmopolitan Broadcasting Corp. in 1973 and is based on information he obtained from individual program producers. Transcript at 2753. The producers did not themselves testify to or otherwise verify the accuracy of the information in the Exhibit. The length of each interview is characterized in Lewis' affidavit accompanying the Exhibit as being "approximate" only, and the date of each interview is specific only as to the year.

[12] The Exhibit includes interviews broadcast over a period of six years. Of the 75 guests listed, 32 were shown as being interviewed in 1972, by far the greatest number of interviews shown for any one year. Assuming that the interviews for 1972 lasted approximately as long as 10 minutes, as represented, this would still amount to an average of less than 26 minutes per month of programming time devoted to such interviews. Though Cosmopoli-

establish the public service elements in its foreign language programming, Cosmopolitan was given some credit for the salutary value of the foreign language programming, and, in particular, for the variety of languages in which it broadcast. See Initial Decision, para. 31.

9. The Commission's determination that WHBI's programming was not worthy of special merit did not rest solely on its conclusions about WHBI's foreign language programming, however. A significant and important portion of the Commission's Decision pertaining to Cosmopolitan's programming was devoted to consideration of Cosmopolitan's public service programming broadcast in English.[13] Much of Cosmopolitan's programming was directed to foreign language minorities in the greater New York Metropolitan area, but the Commission agreed with the Presiding Judge that WHBI had played an insignificant role in the community affairs of Newark, New Jersey, WHBI's city of license. See Commission Decision, para. 15.

10. To sum up at this point, after reevaluating the record, it is our continued view that Cosmopolitan has failed to demonstrate that merit should be awarded on the basis of its public service programming, either in its foreign language or English language programming. In this latter connection, it is significant that Cosmopolitan has exhibited serious deficiencies in fulfilling its

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tan characterizes the list of guests as being a "representative" listing, the Commission cannot assume that more interviews actually occurred. The testimony of the individual program producers does not indicate that such interviews occurred with any great frequency or that they usually lasted more than ten minutes at most. See *e.g.*, transcript at 785, 1439, 1465, 1507, 1871, 1879.

[13] See 59 FCC 2d 558, 564; 61 FCC 2d 257, 259-61. As the Court recognized, the meritorious programming issue in this proceeding was not limited to the merit of WHBI's foreign language programming, but included all of WHBI's programming, including one-third that was broadcast in English. 581 F.2d at 929.

public service obligations to its city of license. Short of that, the renewal applicant has failed to show that the public service "elements" in its foreign language entertainment programming were adequate—either in amount or documented nature—to warrant any appreciable weight. In accordance with the Court's instructions, however, one further element must be weighed in our resolution of the meritorious programming issue.

11. In directing the Commission to correct "a serious omission in its deliberations concerning the meritoriousness of WHBI's programming," the Court ruled that the Commission must include consideration of the "uniqueness of that programming to a significant segment of the public" in its evaluation.[14] We have carefully analyzed the evidence proffered by WHBI in this regard[15] and find not only was there a diversity of foreign language programming in Cosmopolitan's service area, but that the applicant's claim of uniqueness rests on no more

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[14] The Court's concern with unique entertainment formats comes from cases involving assignments that would result in the loss of formats provided by the existing licensees. See *Citizens Committee to Save WEFM* v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974). Also see *WNCN Listeners Guild and Citizens Communications Center* v. *FCC*, No. 76-1692 et al. F.2d (D.C. Cir. 1979).

[15] The Commission's findings regarding the "uniqueness" of WHBI's programming are based on evidence proffered by Cosmopolitan consisting of surveys conducted by Donald Lewis and Pulse, Inc. (Cosmopolitan Exhibits 50 and 33). The Judge rejected these Exhibits for reasons relating, at least in part, to their accuracy and reliability. See transcript at 1974 and 2579. Our consideration of these Exhibits constitutes a reversal of the Judge's rulings to the extent he refused to consider the uniqueness of WHBI's programming. Cosmopolitan cannot argue that it did not produce more evidence because of the Judge's statement, cited by the Court, that indicated his disinclination to consider such evidence. This ruling occurred at a relatively late stage in the proceeding, and the Judge had earlier indicated that he would be willing to consider evidence of the uniqueness of WHBI's programming.

than the broadcast of a small number of programs to which a small percentage of WHBI's programming time was devoted.

12. The Court recognized that the issue presented here is not one of format. Indeed, our examination of the proffered evidence reveals that three other stations in particular in WHBI's service area carried a wide variety of foreign language programming, and all told, over 23 foreign languages were carried on other stations in WHBI's service area.[16] It is true that many languages broadcast on other stations were carried in small amounts (2 hours or less per week); however, that was also true of most of the languages broadcast over WHBI.

13. Turning to the uniqueness of Cosmopolitan's programming, we note that the greater part of WHBI's foreign language programming was in Spanish, Italian and Greek, languages carried in ample quantities on other stations.[17] Only a small percentage of WHBI's program-

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[16] With regard to the accuracy of Cosmopolitan's surveys, however, it should be noted that the Pulse survey does not include programs broadcast in English that are directed at ethnic groups, although Cosmopolitan relies on such programs in its own listing of ethnic-oriented programming (See *e.g.*, Cosmopolitan Exhibit 6). Also of the 62 stations surveyed by Pulse, Inc., no information was adduced on the foreign language programming of 5 of them.

[17] Of the evidence offered by Cosmopolitan in this regard, Cosmopolitan's 1969 Renewal Application gives the clearest picture of the relative composition of WHBI's foreign language programming. The application shows that over 80% of WHBI's foreign language programming time was devoted to Spanish (45.5 hours per week), Italian (35.5 hours per week), and Greek (10 hours per week.) The Pulse, Inc. Survey and Donald Lewis survey reveal that at least 11 other stations broadcast Spanish language programs (including two stations WADO and WHOM, that broadcast almost exclusively in Spanish, and one, WBNX, that carried 63 hours per week of Spanish programming), four other stations carried Italian language programming totaling approximately 40 hours per week, and at least five other stations carried Greek programming, totaling approximately 35 hours per week. Cosmopolitan Exhibits 50 and 33.

ming time—less than 13%—appears to have been devoted to the more unusual and unique foreign language programs.[18] And this programming was directed to a very small percentage of the foreign language population in WHBI's service area.[19] In any event, the loss of Cosmopolitan as a licensee does not foreclose automatically the possibility that these particular programs may continue to be broadcast. Presumably, the broker producers of these programs could offer their programs to other stations in the signal area that carry foreign language programs and, indeed, there is evidence in this record of Cosmopolitan's foreign language programming having been previously carried on other stations in the service area. See transcript at 1456, 1562, 1864.

14. Although public service programming has been singled out as being of primary significance in determining whether a licensee's programming has been meritorious, the inquiry may encompass the entire programming format. Thus, the Commission's policy of recognizing the value of unique programming, particularly that directed to historically underserved ethnic and racial minorities, is consonant with the Court's directive. What remains to be decided by the Commission, as the Court noted, is the weight to be accorded a showing of unique

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[18] Cosmopolitan's showing as to unique programming was confined to that broadcast at the time of hearing. At that time the only foreign languages broadcast exclusively by WHBI were Bulgarian (30 minutes per week), Macedonian (1 hour per week), Armenian (30 minutes per week) and Hungarian (4 hours per week). See also Cosmopolitan's Appellant Brief to the Court in this proceeding at 67, n. 59.

[19] Calculating from the population figures contained in Appendix A to Cosmopolitan's Exhibit 6, the four languages (three of which are not separately listed in U.S. Census Reports) accounted for slightly over 2% of the number of the foreign language residents of WHBI's service area whose mother tongue was broadcast by WHBI.

programming, here simply a showing that the licensee had broadcast a small amount of programming in foreign languages not otherwise heard in its service area.[20] In view of that meagre showing and given the diversity and quantity of foreign language programming within Cosmopolitan's service area, no appreciable weight can be accorded Cosmopolitan with respect to this element of "uniqueness" under the meritorious programming issue.[21] Again, given the magnitude and frequency of violations demonstrated on this record, we believe that Cosmopolitan's programming was not sufficiently meritorious to mitigate these serious and numerous adverse findings. The magnitude of Cosmopolitan's violations was an important basis for our earlier decision that continued service by Cosmopolitan would not be in the public interest. In the case of this licensee, it is doubtful whether a clear finding of meritorious programming service, let alone that shown here, could have been of sufficient decisional significance to affect the outcome of the proceeding.[22]

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[20] A failure to distinguish between levels of service to minority groups, particularly in this context, could lead licensees to believe the Commission employs a different or lower standard for program service when a licensee's programming is directed at such groups; or indeed that the Commission will even reward poor service to minority groups by deeming the value of such service sufficient to justify renewal for an otherwise unqualified licensee. Ultimately this would provide the licensee little incentive to supply more than mediocre (or worse) levels of programming to those who may have the most critical need for adequate public service programming.

[21] We recognize that it is somewhat anomalous to award merit to a licensee for programs over which it was found to have abdicated control both with respect to selection and content. However, given our determination as to the weight which should be accorded that showing, it is unnecessary to address this matter at this late stage in this proceeding.

[22] Cf. *United Broadcasting Co. of Florida, Inc.* 60 FCC 2d 816, 189 (1976).

15. ACCORDINGLY, IT IS ORDERED, That the above-captioned application of Cosmopolitan Broadcasting Corporation for renewal of license of Station WHBI-FM, Newark, New Jersey, IS DENIED.

16. IT IS FURTHER ORDERED, That Cosmopolitan Broadcasting Corporation IS AUTHORIZED to continue to operate the station until 12:01 a.m., March 23, 1980, to enable the licensee to conclude the station's affairs. Provided however, that if the licensee seeks judicial review of our Decision it is authorized to continue to operate station WHBI-FM until thirty (30) days after the Court which has jurisdiction to review this proceeding issues its mandate.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

APPENDIX G

Programming Meritorious
Reconsideration, Petition For, Denial Of

Petitions for reconsideration of denial of FM license renewal denied. Unique programming not sufficiently meritorious to mitigate serious and numerous adverse findings. DO. 19657

FCC 80-393

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 19657
File Nos. BRH-1359
BRSCA-746

In re Application of

COSMOPOLITAN BROADCASTING CORPORATION
NEWARK, NEW JERSEY

FOR RENEWAL OF MAIN, AUXILIARY AND SCA LICENSES
FOR WHBI (FM)

MEMORANDUM OPINION AND ORDER

(Adopted: July 1, 1980; Released: July 18, 1980)

BY THE COMMISSION: COMMISSIONER JONES ABSENT.

1. Before the Commission are four petitions for reconsideration of a supplemental decision [1] and a petition

[1] Petitions for reconsideration were filed by Cosmopolitan Broadcasting Corporation, Ethnic Broadcasting Corp. *et al.*, Unique Radio Group, Inc. and the Bulgarian American League *et al.*, on February 13, 1980. The Broadcast Bureau filed oppositions to the

for reconsideration of a companion Memorandum Opinion and Order in this proceeding.[2]

2. By Decision released June 3, 1976, the Commission denied Cosmopolitan Broadcasting Corporation's (Cosmopolitan) application for renewal of its license to operate station WHBI-FM, Newark, New Jersey.[3] Cosmopolitan sought review in the United States Court of Appeals for the District of Columbia Circuit. The court upheld the Commission's conclusions that Cosmopolitan had virtually abdicated all control over the selection and content of its programming and had committed other violations,[4] but remanded this case to the Commission for further findings and conclusions on whether WHBI's programming was sufficiently meritorious to warrant renewal despite these violations.[5]

3. The court's remand order focused on the Commission's conclusions regarding the merit of Cosmopolitan's foreign language programming. At the time of its 1969 renewal application, Cosmopolitan devoted almost two-thirds of its program time to ethnic programming,

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first three petitions and a motion to dismiss the latter between February 20-27, 1980, and Cosmopolitan filed a reply on March 10, 1980.

[2] A petition for reconsideration was filed by Cosmopolitan Broadcasting Corporation and Unique Radio Group, Inc. on February 6, 1980. The Broadcast Bureau filed an opposition on February 20, 1980.

[3] 59 FCC 2d 558, *pet. for recon. denied*, 61 FCC 2d 257 (1976).

[4] The Commission found that Cosmopolitan had abdicated its responsibility as a licensee by selling virtually all its program time to brokers and had not maintained control over programming content. Other violations included the promotion of a lottery, broadcasting false and misleading advertising, improper logging, failure to meet filing requirements and inadequate record keeping.

[5] *Cosmopolitan Broadcasting Corporation* v. *FCC*, 581 F. 2d 917 (D.C. Cir. 1978).

produced and presented by time brokers in 18 foreign languages. In its decision, the Commission had acknowledged the importance of a licensee's service to ethnic minority groups, but had agreed with the Administrative Law Judge that the licensee's particular foreign language programming did not warrant any finding of special merit. Thus, the Commission found that while Cosmopolitan alleged some foreign language programming responsive to the designated meritorious programming issue, it was not able to substantiate this claim from program logs submitted in evidence.[6] Additionally, the Commission adopted the Judge's findings that Cosmopolitan's foreign language programming consisted largely of ethnic musical entertainment and contained few public service elements.

4. The court found that even though there was no substantiation from program logs, Cosmopolitan had offered a great deal of evidence concerning the content of its programming, and that the Commission's conclusion regarding program logs apparently ignored this evidence. Thus the court remanded this proceeding to the Commission for a more reasoned consideration of the question whether the evidence of programming content in this proceeding was sufficient to establish the merit of Cosmopolitan's foreign language programming.

5. In addition, the court objected to a ruling by the presiding judge in which the judge—in refusing to accept a survey of the foreign language programming broadcast by other stations in Cosmopolitan's service area—made the following statement:

> . . . if the programming relied upon by WHBI is in fact meritorious, then it is in fact meritorious regardless of whether or not it is aired by any other station. If it is not meritorious, I do not think you

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[6] 59 FCC 2d at 564.

> can create merit in the programming by reason of the fact that no other station carries that particular language.[7]

The court said that this ruling by the presiding judge was wrong as a matter of law: where there is a likelihood that a license may not be renewed, determination of the meritoriousness of programming must include consideration of the uniqueness of that programming to a significant segment of the public. Therefore, the court directed the Commission to give due regard to this consideration in its deliberations concerning the meritoriousness of WHBI's programming. It stated, however, that it expressed no view as to whether consideration of this factor would affect the Commission's ultimate determination of the meritoriousness of WHBI's foreign language programming or whether, even if found meritorious, the seriousness of Cosmopolitan's other violations might be mitigated enough to deserve the imposition of a lesser sanction.[8]

6. In accordance with the court's instructions, the Commission in a supplemental decision clarified and amplified what weight it accorded both program log and other evidence in assessing Cosmopolitan's foreign language programming.[9] Second, it considered the showing (both proffered and accepted) made by Cosmopolitan with respect to the uniqueness of its foreign language programming and, as the court directed, determined what weight to accord this showing under the meritorious programming issue.[10]

7. Turning to the first aspect of the court's concern, the Commission explained why the absence of program

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[7] Tr. at 2575.

[8] 581 F. 2d at 932.

[9] 75 FCC 2d 423 (1980) at 425.

[10] 75 FCC 2d at 425.

log evidence was of primary significance in its assessment of the meritoriousness of Cosmopolitan's foreign language programming; program logs provide the Commission with relatively reliable and precise information as to the amount of time a licensee has actually devoted to public service programming categories.[11] This emphasis, the Commission explained, was not meant to imply that it did not consider other evidence. Indeed, it continued, it was necessary to look to non-log evidence of programming segments of a public service nature, such as announcements contained within entertainment programs.[12] Although Cosmopolitan attempted to adduce such evidence through both testimony and exhibits, the evidence in main part was vague and inconclusive as to both the amount of time devoted to and the precise nature of the non-entertainment segments.[13] In sum, the Commission

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[11] The meritorious programming issue was framed to give primary emphasis to the public service programming offered by Cosmopolitan, that is "to determine whether the programming of station WHBI(FM) has been meritorious, particularly with regard to public service programs". These program categories are routinely reflected on program logs. Evidence of meritorious programming adduced for purposes of mitigation is not relevant after a licensee learns his license is in jeopardy; as a result, the issue here looked to evidence of meritorious programming presented before December 1972. See 75 FCC 2d at 427, n. 8.

[12] 75 FCC 2d at 427. Cosmopolitan's foreign language programs were for the most part logged as entertainment programming. See Cosmopolitan's 1969 renewal application, Exhibit 8.

[13] More specifically, the Commission found that the testimony of 15 producers of foreign language programs broadcast by WHBI revealed that news and public service announcements were usually broadcast on an irregular basis and that it was unclear whether the items broadcast were in the nature of relevant categories of programming service, an exhibit (Exhibit 6), consisting of a general summary or description of WHBI's foreign language programming was vague and thus not sufficiently probative in this regard; and a further exhibit (Exhibit 54) containing a list of 75 guests, even if it had been accepted as accurate and reliable, related to an insubstantial amount of time. 75 FCC 2d at 427-428.

concluded that Cosmopolitan had failed to show that merit should be awarded on the basis of its public service programs, either in its foreign language or English programming. Short of that, it continued, the applicant failed to show that the public service elements in its foreign language programming were adequate—either in amount or documented nature—to warrant any appreciable weight.[14]

8. Turning to the second aspect of the court's remand, the Commission accepted into evidence the showing WHBI offered as to the uniqueness of its programming.[15] It found not only that there was a diversity of foreign language programming in Cosmopolitan's general service area, but that the applicant's claim of uniqueness rested on no more than the broadcast of a small number of programs to which a small percentage of WHBI's programming was devoted. Examination of Cosmopolitan's showing revealed that three other stations in Cosmopolitan's general service area carried a wide variety of foreign language programming and that over 23 foreign languages were carried on other stations in WHBI's service area. Further, Cosmopolitan's 1969 renewal application disclosed that the greater part of WHBI's foreign language programming was in Spanish, Italian and Greek, languages carried in ample quantities on other stations, and that only a small percentage of time was devoted to the more unusual and unique foreign language programs which, in turn, were directed to a very small percentage of the foreign language population in WHBI's service area. In sum the Commission concluded that Cosmopolitan's meagre showing in this regard did not

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[14] 75 FCC 2d at 428.

[15] In so doing we reversed in part the presiding judge's rulings in which he had rejected two exhibits (Exhibits 50 and 33) containing surveys of the foreign language programming offered by other stations in Cosmopolitan's service area.

establish the uniqueness of an appreciable amount of programming to a significant segment of the public. As a consequence, and given the magnitude and frequency of the violations, the Commission concluded that this factor could not be given sufficient weight to alter the Commission's previous determination that Cosmopolitan's programming was not sufficiently meritorious to mitigate its established misconduct.[16]

9. Cosmopolitan now urges the Commission to reconsider its supplemental decision or to hold further hearings to fully comply with the court's remand order.[17] It makes four sets of arguments in support of the first alternative: three which question the manner in which the Commission evaluated the record evidence, and one which asserts that an allegedly new Commission policy on time brokerage arrangements should alter the disposition here. Alternatively, Cosmopolitan argues that rulings of the Review Board and ALJ effectively precluded the development of an adequate record.

10. Essentially Cosmopolitan's arguments—particularly those concerning the manner in which the Commission evaluated the record evidence—are simply reargument that has been fully addressed in our supplemental decision. Ordinarily these arguments would not be re-

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[16] 75 FCC 2d at 430, 431.

[17] Petitioner also requests oral argument. Since its arguments are mere reargument, no purpose would be served by holding argument. The petitions for reconsideration of our supplemental decision filed by Ethnic Broadcasting Corp. *et al.*, the Bulgarian American League *et al.*, and Unique Radio Group, Inc. shall be dismissed as unauthorized pleadings. Ethnic Broadcasting Corp. was denied permission to intervene by Order, FCC 79-874, released January 7, 1980; the Bulgarian American League has not requested leave to intervene; and Unique Radio Group, Inc. was permitted limited leave to intervene, also by Order, FCC 79-874, *supra*, solely for the purpose of addressing Cosmopolitan's request for distress sale relief.

addressed.[18] However, since the adequacy of our findings and conclusions was of such critical import in the court's view, we shall address Cosmopolitan's assertions, assertions which to a large extent either reflect an incomplete or incorrect reading of the supplemental decision.

11. As an initial matter Cosmopolitan takes issue with the Commission's statement that the licensee attempted to show the meritoriousness of its programming primarily through the testimony of 15 producers; it asserts that it did not rely even substantially on this testimony to establish the content of its programming, and suggests that the Commission overlooked or ignored Exhibit 6 on which it placed principal reliance.[19] Neither assertion is borne out. The first contradicts Cosmopolitan's earlier representations to the Commission about its reliance on the producers' testimony in this regard.[20] And its second assertion ignores the Commission's findings about the vague and generalized nature of Exhibit 6, discussed in paragraph 8 of the supplemental decision. In this latter regard, petitioner's claim that Exhibit 6 was, in part, specific about the amounts of time devoted to public

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[18] It is well established that reconsideration will not be granted "merely for the purpose of again debating matters on which [the Commission] has once deliberated and spoken." WWIZ, Inc., 37 FCC 685, 686 (1964), *affirmed sub nom. Lorain Journal Company* v. *FCC*, 122 U.S.App.D.C. 127, 351 F. 2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966).

[19] Exhibit 6 consisted of non-log evidence in the form of a general summary of the content of WHBI's foreign language programming.

[20] *See*, for example, at page 15 of Cosmopolitan's petition for reconsideration of the Commission's 1976 decision in this proceeding where the licensee stated:

> Cosmopolitan did not attempt to establish the meritoriousness of WHBI's programming with logs.[15] Rather, it provided extensive evidence as to the content and character of WHBI's foreign language and ethnic programming through the testimony of Donald Lewis and a large number of WHBI's producers.

service categories does not respond to our concern that, as a whole, it neither established the nature of many of the segments held out to be public service elements nor, more critically, that the programs regularly or routinely contained such segments.[21]

12. In arguing that the Commission mischaracterized the evidence it did consider, Cosmopolitan contends that to have dismissed Exhibit 6 as vague was clearly arbitrary and capricious. Similarly, it maintains that the testimony of the producers does contain some specific corroborative information as to the nature and amount of public service segments. Moreover, it asserts that rather than holding out Exhibit 54 as an exhaustive showing, it was offered as a "representative" listing of interviewees intended to give substance to its claim that guest appearances were frequently included in its ethnic programs. In arguing that there was some unspecified amount of documentation of the broadcast of public service segments in the record—a claim with which we do not disagree—Cosmopolitan has not shown that there is any basis for altering our conclusions in this regard; critically, it has neither argued nor shown that the public service elements in its foreign language programming were adequate—either in amount or documented nature—to warrant any appreciable weight.

13. Cosmopolitan's claim that the Commission erred in concluding that only a small percentage of WHBI's programming was unique similarly does not withstand close scrutiny. First, contrary to its assertion, there is record evidence about the foreign language programming of other stations within its service area. The Commission in its supplemental decision reversed the rulings of the Presiding Judge which rejected Cosmopolitan's Exhibits 33 and 50, in which it had attempted to show the foreign

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[21] Indeed in footnote 20 of its current petition, Cosmopolitan admits that the testimony of WHBI's producers reflected that the non-entertainment material reflected in their programs might "vary widely" from week to week.

language programming of other radio stations within its 1mv/m service contour.[22] The particular exhibit (Exhibit 33) on which it now belately relies to show, *inter alia*, that eleven foreign languages—rather than four[23]—were broadcast exclusively on WHBI at the time of hearing, however, is not a sufficiently complete or reliable survey to support that claim.[24] In sum, the record evidence establishes that Cosmopolitan broadcast exclusively in only four foreign languages at the time of hearing and that this programming was directed to a very small percentage of the foreign language population in WHBI's service area.[25]

14. Cosmopolitan also suggests that in order to be consistent with a recent change in Commission policy, the Commission should no longer fault the licensee's failure to exercise adequate supervision and control over WHBI's programming. The new policy, it asserts, is implict in a Notice of Inquiry, 43 FR 55804, published November 29, 1978, in which the Commission invited comment on the desirability and feasibility of encouraging minority ownership through the brokerage arrange-

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[22] In footnote 15 of the supplemental decision we stated that our consideration of these exhibits was a reversal of the judge's rulings to the extent he refused to consider the uniqueness of WHBI's programming. His rulings, insofar as they reflected on the accuracy and reliability of the exhibits, were not disturbed.

[23] *See* Cosmopolitan's Appellant Brief to the Court in this proceeding at 67, n. 59 in which it claimed that four languages were broadcast exclusively on WHBI at the time of hearing.

[24] *See* footnote 16 of the supplemental decision in which we note that the Pulse survey (Exhibit 33) did not include programs broadcast in English that are directed at ethnic groups, although Cosmopolitan relies on such programs in its own listing of ethnic-oriented programming. (Cosmopolitan Exhibit 6). Also of the 62 stations surveyed, no information was adduced on the foreign language programming of 5 of them.

[25] As noted in footnote 19 of the supplemental opinion, this conclusion was based on figures contained in Appendix A to Cosmopolitan's Exhibit 6.

ments. Suffice it to say that Cosmopolitan's speculation as to Commission intent in issuing that notice is completely without basis: it is our continued intention to insure that time brokerage arrangements—however, much they may be encouraged—do not involve an improper delegation of program control by the licensee.

15. In the event the Commission does not reverse its decision, Cosmopolitan urges that further hearings are required since rulings by the ALJ and Review Board prevented the development of a complete record. It explains that in refusing to accept Cosmopolitan's Exhibits 33 and 50 into evidence the ALJ wrongfully precluded Cosmopolitan from adducing evidence on the foreign language programming of other stations within its 1 mv/m contour. Again, this contention ignores our reversal of the judge's rulings in order to determine the extent to which these exhibits establish WHBI's unique programming.[26] Although its argument is not entirely clear, Cosmopolitan also appears to argue that in framing the meritorious programming issue to consider only evidence of the public service content of WHBI's programs, the Review Board initially foreclosed any consideration of unique programming. Its basic assumption is in error, however; the issue was framed to give primary emphasis to public service programming, and neither the issue itself nor the Review Board discussion preclude consideration of the value of unique programming.[27] Moreover, even if the petitioner were correct in arguing that the rulings prevented the adduction of evidence, the rulings did not interfere with Cosmopolitan making an offer of proof and thus being in a position to preserve its

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[26] Although the exhibits were accepted into evidence by the Commission, neither the judge nor the Commission found them to be fully reliable or accurate.

[27] The issue was framed "to determine whether the programming of station WHBI(FM) has been meritorious, particularly with regard to public service programs." 39 FCC 2d 698, 699 (Rev. Bd. 1973).

right to appeal any rejection of evidence.[28] In sum, Cosmopolitan was not prevented from seeking to adduce the evidence which it claims is necessary for a full record.[29]

16. Despite the shortcoming in Cosmopolitan's petition, we have carefully re-examined the record in light of the court's directives. Based on this re-examination, we again conclude that no appreciable weight can be accorded Cosmopolitan's showing of uniqueness, and that given the magnitude and frequency of violations demonstrated on the record, Cosmopolitan's programming was not sufficiently meritorious to mitigate these serious and numerous adverse findings.

17. ACCORDINGLY, IT IS ORDERED, That the petitions for reconsideration filed by Ethnic Broadcasting Corp., *et al.*, Unique Radio Group, Inc. and the Bulgarian American League *et al.* ARE DISMISSED as unauthorized pleadings.

18. IT IS FURTHER ORDERED, That the joint petition for reconsideration filed by Cosmopolitan Broadcasting Corporation and Unique Radio Group, Inc. on February 6, 1980, and the petition for reconsideration, filed by Cosmopolitan Broadcasting Company on February 13, 1980, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

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[28] As a new matter, Cosmopolitan also argues that the Commission should look beyond the question of whether WHBI exclusively broadcast certain foreign language programs and examine the specific content of programs to determine whether they are directed to cultural and ethnic differences within a language group. Aside from its First Amendment implications, this approach would appear to go far beyond the mandate of the court.

[29] The petitions for reconsideration of our Memorandum Opinion and Order, FCC 79-874, *supra*, in which we denied distress sale relief, shall also be denied as reargument. (Cosmopolitan's request for distress relief had been based on the argument that further hearings were required.)

Opposition

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No. 81-601 and No. 81-603

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-601

COSMOPOLITAN BROADCASTING CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

No. 81-603

BULGARIAN AMERICAN LEAGUE, COLUMBIAN LAWYERS ASSOCIATION, CONGRESS OF PORTUGESE PEOPLE, FEDERATION OF LITHUANIAN WOMEN'S CLUBS, THE JAPANESE AMERICAN ASSOCIATION OF NEW YORK, INC., YUGOSLAV CONSOLIDATED BENEVOLENT ASSOCIATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

RESPONSE OF RESPONDENT AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Questions Presented for Review

Respondent* American Civil Liberties Union of New Jersey adopts the statements of the questions presented for review as set forth in the petitions for writ of certiorari of Petitioner Cosmopolitan Broadcasting Corporation and of Petitioners Bulgarian American League, et al.

Respondent American Civil Liberties Union of New Jersey adds, however, the following questions presented.

A. Whether the Federal Communications Commission accorded insufficient weight to considerations under the First Amendment to the Constitution of the United States.

B. Whether the Federal Communications Commission denied petitioners due process of law in refusing to reopen proceedings for presentation of further evidence.

C. Whether the Federal Communications Commission acted arbitrarily and capriciously and failed to comply with the mandate of the United States Court of Appeals for the District of Columbia Circuit in refusing to reopen the hearing and accept additional evidence.

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* Petitioners Bulgarian American League, et al., incorrectly and inadvertently omitted American Civil Liberties Union of New Jersey as a party. The American Civil Liberties Union of New Jersey was a party aligned with Petitioners below and appears here supporting the Petitioners seeking reversal of the judgment below. Nevertheless, pursuant to Supreme Court Rule 19.6, the American Civil Liberties Union of New Jersey is formally designated a respondent, since it did not file a separate petition for certiorari. Petitioner Cosmopolitan Broadcasting Corporation did list American Civil Liberties Union of New Jersey as a respondent.

Statement Under Rule 28.1

Respondent American Civil Liberties Union of New Jersey is affiliated by an informal bond of association with the American Civil Liberties Union, a national organization whose mandate to defend and advocate the constitutional rights and civil liberties of the people of all of the United States is analagous to the similar statewide mandate of Respondent American Civil Liberties Union of New Jersey. Respondent American Civil Liberties Union of New Jersey has no parent company, no subsidiary, and no affiliates other than the American Civil Liberties Union and its affiliates in the several States of the United States.

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United States Constitution, Fifth Amendment ....*passim*

No. 81-601 and No. 81-603

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-601

COSMOPOLITAN BROADCASTING CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

No. 81-603

BULGARIAN AMERICAN LEAGUE, COLUMBIAN LAWYERS ASSOCIATION, CONGRESS OF PORTUGESE PEOPLE, FEDERATION OF LITHUANIAN WOMEN'S CLUBS, THE JAPANESE AMERICAN ASSOCIATION OF NEW YORK, INC., YUGOSLAV CONSOLIDATED BENEVOLENT ASSOCIATION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

RESPONSE OF RESPONDENT AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Constitutional Provisions Involved

Respondent American Civil Liberties Union of New Jersey adopts the citations set forth by the petitions of

both Petitioner Cosmopolitan Broadcasting Corporation and Petitioners Bulgarian American League, et al., but in addition cites the First Amendment to the Constitution of the United States, which reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

and the Fifth Amendment to the Constitution of the United States, which reads in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Statement of the Case

Petitioner Cosmopolitan Broadcasting Corporation ("Cosmopolitan") has owned and operated radio station WHBI(FM) in Newark, New Jersey, for almost a decade. A substantial portion of its programming time is devoted to foreign language broadcasts, including broadcasts in no less than twenty-four foreign languages and directed at twenty-eight ethnic groups. Respondent American Civil Liberties Union of New Jersey ("ACLU") became a party to the proceeding before the Federal Communications Commission ("FCC"), arguing that First Amendment considerations and values more than outweighed any deficiencies the broadcaster might have exhibited because WHBI provided a critically important means of linguistic and cultural communication and identification to distinct ethnic groups, many of whom had no adequate alternate means

of receving radio communication and associating with one another as a radio audience.

When the FCC nevertheless denied Cosmopolitan's application for renewal of its broadcast license, ACLU appealed to the United States Court of Appeals for the District of Columbia Circuit. That Court remanded the matter to the FCC (Cosmopolitan's Appendix [CA] 5a), holding, as argued by ACLU, that the FCC erred in failing to give appropriate consideration to the value and importance of Cosmopolitan's broadcast format, the needs and rights of the ethnic communities, and the First Amendment values involved. The Court of Appeals directed the FCC upon remand to consider evidence concerning the value and importance of such broadcasts and to determine upon such evidence whether WHBI's programming was of sufficient merit to outweigh the deficiencies of operation and management which the FCC had in its operations.

Upon remand, FCC failed to hold any additional hearings or to accept further evidence, either from the broadcaster (CA 114a) or from other parties who had appeared (CA 159a), including the Petitioners here, Bulgarian American League and five additional associations of ethnic groups who claimed an interest in the multi-language, multi-cultural format unique to Cosmopolitan. Rejecting efforts by the groups concerned to present further evidence, and frustrating the efforts of the broadcaster to supplement and expand upon the initial record, the FCC adhered (CA 145a) persistently (CA 159a) to its original decision (CA 114a), and the Court of Appeals affirmed without opinion.

Summary of the Argument

The FCC erred by failing to give sufficient weight to First Amendment considerations in comparison to the technical operational deficiencies of which the broadcaster was found guilty. The FCC denied the parties and the listening public due process of law by refusing to reopen the proceedings to accept and evaluate proffered material evidence on the First Amendment issue. The petitions for certiorari should be granted to review the judgment below.

REASONS FOR GRANTING THE WRIT

Introduction

Respondent American Civil Liberties Union of New Jersey, in response to the petitions of the broadcaster, Petitioner Cosmopolitan Broadcasting Corporation, and the ethnic groups, Petitioners Bulgarian American League, et al., and in accordance with Rule 19.6, hereby supports the position of Petitioners and urges that the writs of certiorari sought by both the broadcaster and the ethnic groups be granted.

1.

Respondent American Civil Liberties Union of New Jersey adopts all of the reasons set forth by both petitions and suggests to the Court the following additional reasons for granting the writ.

2.

The Federal Communications Commission Failed to Accord Sufficient Weight to the First Amendment

In exercising its statutory mandate to control the traffic on the public airwaves for the general good of all, the FCC,

as all governmental agencies, is governed by the First Amendment and other provisions of the Constitution of the United States. That the right to broadcast and the right to hear broadcasting are activities protected by the First Amendment cannot be questioned. The conceptual foundation of the First Amendment is the fostering of diversity, and governmental actions which tend to chill or deter minority or unique expression are antithetical to the purpose and language of the First Amendment.

In remanding this case to the FCC, the Court of Appeals specifically made reference to the public interest in broadcast format diversity and the protected needs of specialized audiences. Nevertheless, the FCC thwarted efforts by the parties concerned to present evidence in support of the very propositions which were at the heart of the First Amendment issues which the Court of Appeals had remanded to it.

The FCC's decision, adhered to on remand, is inconsistent with its First Amendment obligation. The society of the United States is not homogenous; and, if not unique, it is at least outstanding in world history as a confluence of traditions and civilizations. There was a time when public and private efforts were encouraged to destroy or at least minimize ethnic differences and cultural disparities, but a healthier and more sophisticated attitude, consistent with First Amendment commands, now prevails. We are proud to be hyphenated-Americans with traditions in language, music, art, dance, cuisine, costume, humor, and outlook stemming from our roots in other continents. Nurturing of those distinctions and respect for those traditions are of public value. The First Amendment commands that government not interfere with communications among individuals and members of groups. The right of people to communicate in the language and idiom of their choice, to assemble peaceably, each by his or her own radio receiver, and feel

membership in a community thus drawn together by a broadcaster is a right protected by the First Amendment and threatened by the FCC's action in this case.

In short, the FCC turned its back upon its constitutional obligation. The failure of the FCC even to attempt to articulate any response to the constitutional arguments raised before it and the Circuit Court of Appeals silently but eloquently attests to the FCC's failure to carry out its responsibility.

3.

The Federal Communications Commission Denied All Petitioners and Respondent American Civil Liberties Union of New Jersey Due Process of Law in Failing and Refusing to Reopen the Hearing.

The Court of Appeals remanded the matter to the FCC to correct various omissions in the first round of administrative activity (CA 35a), pointing out that much of the evidence was vague and anecdotal (CA 32a). The remand also directed the FCC to inquire whether and to what extent Cosmopolitan's outlet was unique and served a specified audience. The Court observed that there was only "*some* evidence . . . *presently* in the record" (CA 36a) on these vital issues [emphasis supplied].

By nevertheless refusing the timely and persistent applications of all petitioners to supplement the record, the FCC denied the Petitioners, this Respondent, and the public the opportunity to have its decision based upon timely and adequate evidence. The FCC's failure and refusal to permit introduction of relevant evidence upon material points denied Petitioners and the listening public due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

CONCLUSION

For the reasons here stated, and for all the reasons stated in the petitions previously filed in this case, the petitions for certiorari should be granted to review the judgment below.

Dated: New York, New York
October 9, 1981

Respectfully submitted,

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Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

COSMOPOLITAN BROADCASTING CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

BULGARIAN AMERICAN LEAGUE, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission acted arbitrarily and capriciously in denying license renewal to a broadcast licensee who was found, after an evidentiary hearing, to have abdicated its control over the programming broadcast over its station and to have violated numerous statutory and agency requirements.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-4a) is not reported. The orders of the Federal Communications Commission on remand (Pet. App. 145a-158a and 159a-170a) are reported at 75 F.C.C.2d 423 and 79 F.C.C.2d 16. The earlier opinion of the court of appeals remanding this case to the Commission (Pet. App. 5a-38a) is reported at 581 F. 2d 917. The earlier decisions of the Commission that were the subject of the remand (Pet. App. 114a-134a and 135a-144a) are reported at 59 F.C.C.2d 558 and 61

F.C.C.2d 257. The decision of the Administrative Law Judge (Pet. App. 39a-113a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1981. The petitions for a writ of certiorari were filed on September 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Cosmopolitan Broadcasting Corporation, the licensee of radio station WHBI (FM), Newark, New Jersey, applied for a renewal of its license on February 26, 1969. A large portion of WHBI's schedule was devoted to ethnic programming that was presented by "time brokers"—persons who pay a flat fee for air time that they may resell to other brokers or use to present their own programming (Pet. App. 8a-9a). The FCC designated the renewal application for an evidentiary hearing on numerous issues concerning alleged violations of various rules and policies of the Commission, including the requirement that a licensee maintain adequate control and supervision over its station's programming and operation (*id.* at 114a-117a).

Following the hearing, both the administrative law judge and a unanimous Commission concluded that Cosmopolitan had abdicated virtually all control over the selection and content of its programming in violation of the Commission's long-standing policy requiring a licensee to be responsible for selecting program material (Pet. App. 117a-118a). Moreover, the administrative law judge and the Commission found numerous other violations of Cosmopolitan's responsibilities, which "suppl[ied] further, cumulative evidence of Cosmopolitan's overall failure to exercise adequate control over WHBI's operations" (Pet. App. 123a-124a). These violations included the promotion of a lottery, in violation of 18 U.S.C. 1304, false and misleading

advertising, improper logging, and a failure to satisfy filing and record keeping obligations (Pet. App. 118a-119a).

In response to petitioner Cosmopolitan's request, the Commission added an additional issue to the proceedings—whether its programming had been meritorious, particularly with regard to public service programs (Pet. App. 117a; footnote omitted). Neither the administrative law judge nor the Commission, however, was persuaded by Cosmopolitan's showing. The Commission observed in this regard that Cosmopolitan "was not able to substantiate this claim [of meritorious programming] from program logs submitted in evidence" (*id.* at 125a). In view of "the magnitude and frequency of violations demonstrated on this record," the Commission agreed with the administrative law judge that Cosmopolitan's renewal application should be denied (*id.* at 126a).

The court of appeals upheld the Commission's conclusions concerning Cosmopolitan's abdication of its responsibilities as a broadcast licensee (Pet. App. 18a, 23a-24a, 28a). The court was concerned, however, that the Commission's emphasis upon the absence of program logs establishing meritorious programming could have caused the Commission to ignore other evidence in the record that was relevant to Cosmopolitan's claim of meritorious programming (*id.* at 31a-34a).[1] The court further held that the Commission's determination of the meritoriousness of WHBI's programming must include consideration of the question whether the programming was unique to a significant segment of the public (*id.* at 35a-37a). The court accordingly remanded the case to the Commission for reconsideration of the question whether Cosmopolitan's

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[1]These claims were based on WHBI's foreign language programming that appealed to ethnic communities in the New York metropolitan area. See Pet. App. 8a, 30a.

programming was sufficiently meritorious to outweigh its other deficiencies as a licensee.

On remand, the Commission stated that its "long-standing" policy in evaluating programming as a possible mitigating factor when a record revealed serious shortcomings was to emphasize public service programming (Pet. App. 148a-149a). The Commission then found that the record did not contain reliable information as to the amount of time actually devoted by WHBI to public service programming categories. The Commission recognized that Cosmopolitan's foreign language entertainment programming might have contained public service segments, such as announcements, which would not be logged as public service programming because they were only segments. The evidence Cosmopolitan relied upon in this regard, however, was found to be "vague and inconclusive as to both the amount of time devoted to and the precise nature of the non-entertainment programming segments" (*id.* at 150a-152a). Moreover, the Commission agreed with the administrative law judge that Cosmopolitan's English language programming was not responsive to Newark's community needs, finding that "Cosmopolitan has exhibited serious deficiencies in fulfilling its public service obligations to its city of license" (*id.* at 153a-154a).

Turning to the possible uniqueness of WHBI's foreign language programming, the Commission found that the greater part of WHBI's foreign language programming was in Spanish, Italian and Greek, all of which were carried "in ample quantities on other stations" in WHBI's service area (Pet. App. 155a). Only a small portion of WHBI's programming time was devoted to broadcasting in a foreign language that did not appear on other stations, and the four languages involved accounted for only slightly more than 2% of the foreign language population in WHBI's service area (*id.* at 155a-156a & nn.18-19). Moreover, the Commission noted that, because these programs were produced

by brokers, they could still continue to be broadcast even if Cosmopolitan's license were not renewed (*id.* at 156a). Accordingly, the Commission concluded that "Cosmopolitan's programming was not sufficiently meritorious to mitigate" the "serious and numerous" adverse findings concerning its violations of its responsibilities (*id.* at 157a). The Commission thus adhered to its decision denying Cosmopolitan's renewal.[2] The court of appeals affirmed without opinion, holding that "the Commission has faithfully complied with our instructions on remand" (Pet. App. 3a-4a).

ARGUMENT

This case simply involves the application of established principles relating to the responsibility of a broadcast licensee to control its station's programming and the discretion of the Commission to choose an appropriate sanction when the licensee has abdicated that responsibility. The decision of the court of appeals is correct, and further review by this Court is unwarranted.

1. Petitioner Cosmopolitan's contention (81-601 Pet. 10-22) that the Commission acted arbitrarily in failing to renew its license is without merit. As the court of appeals recognized, the non-delegable duty of a broadcast licensee to control the programming content of its station is a " 'long-standing bulwark of Commission policy' " and is "[a]t the heart of this case" (Pet. App. 12a, quoting *Network Broadcasting by Standard (AM) and FM Broadcast Stations*, 63 F.C.C.2d 674, 690 (1977)). This principle permits "the allocation of journalistic priorities [to] be concentrated in the licensee rather than diffused among many [and] gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs." *Columbia*

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[2]Several petitions for reconsideration of this decision were filed. These were either denied by the Commission or dismissed as unauthorized pleadings (Pet. App. 159a-170a).

Broadcasting Systems, Inc. v. *Democratic National Committee*, 412 U.S. 94, 125 (1973). In this connection, the Commission has clearly stated its policy that, although licensees may enter into time brokerage contracts as Cosmopolitan did, these contracts do not excuse a licensee from its "obligation to retain control over program content at all times." *United Broadcasting Company*, 4 Rad. Reg. 2d (P & F) 167, 173 (1965).[3]

The record fully supports the Commission's finding that Cosmopolitan abdicated its responsibility in this regard. The licensee's relationship to its time brokers' programming was a "vague" one whereby the licensee merely chose a general format and the language in which programming was to be broadcast and then gave time brokers "complete discretion as to program content" within these perimeters (Pet. App. 16a n.8 & 18a). By 1969, 68% of WHBI's weekly schedule was devoted to brokered foreign language programming even though neither the licensee's controlling stockholder nor any of its regular staff understood any of these foreign languages (*id.* at 8a, 19a). Although the licensee purported to have at least 15% of the foreign language programming checked on a random basis by multi-lingual monitors, these monitors did not "evaluate substantive program content" and were not instructed by the licensee concerning the relevant Commission requirements (Pet. App. 20a, 23a, 121a). Finally, as the court of appeals explained (*id.* at 26a), Cosmopolitan's repeated violations of Commission regulations and federal statutes evidenced "an underlying abdication of licensee responsibility." See also *id.* at 123a-125a.

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[3]The Commission's 1980 *Policy Statement on Part-time Programming*, 82 F.C.C.2d 107, is cited by petitioners as evidence of the Commission's encouragement of time brokered programming. See 81-601 Pet. 17 n.16; 81-603 Pet. 13-14. This *Policy Statement* makes clear, however, the Commission's continuing requirement that the licensee must retain control over and responsibility for all programming. 82 F.C.C.2d at 113-114.

It is well established that it is the Commission's responsibility to determine the appropriate sanction for a licensee's deficiencies and that it has broad discretion in this regard. See, *e.g.*, *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 186-189 (1973); *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 228-229 (1946); *White Mountain Broadcasting Co.* v. *FCC*, 598 F. 2d 274, 277 n.7 (D.C. Cir.), cert. denied, 444 U.S. 963 (1979). The Commission clearly acted within its broad discretion when it concluded that the "magnitude and frequency of violations demonstrated on this record" called for a denial of Cosmopolitan's renewal application (Pet. App. 126a, 157a).

In exercising its discretion in this case, the Commission followed its general policy of affording a licensee an opportunity to argue for a lesser sanction on the basis of its meritorious programming. See Pet. App. 148a-149a. This policy places particular emphasis on public service programming (*i.e.*, news, public affairs and local programming) "because such programming, as the 'foundation stone of the American system of broadcasting,' constitutes a most fundamental and basic aspect of programming service" (*id.* at 149a-150a; citation omitted). After considering the evidence on remand as it was directed to do by the court of appeals, the Commission fully explained why Cosmopolitan's showing on the meritorious programming issue was not sufficient to outweigh the "serious and numerous" findings against it (Pet. App. 157a). To the extent that Cosmopolitan's showing went beyond "vague and inconclusive" evidence, it revealed public service programming that accounted for only "a miniscule amount of WHBI's programming time" (*id.* at 152a & n.12). Insofar as the uniqueness of WHBI's programming was concerned, less than 13% of the programming time was broadcast in foreign languages not broadcast over other stations in WHBI's service area, and this programming was directed to only

approximately 2% of the foreign language population in WHBI's service area (*id.* at 156a & nn. 18-19).[4] Moreover, WHBI was found to have played "an insignificant role in the community affairs of Newark, [its] city of license" (*id.* at 153a). Clearly, the Commission did not abuse its discretion in rejecting the contention that Cosmopolitan's license should be renewed because of its programming despite its numerous violations.

2. Petitioners also contend (81-601 Pet. 19-22; 81-603 Pet. 10-15) that the Commission erred in failing to reopen the record on remand for the presentation of new evidence. This contention is insubstantial. The court of appeals originally remanded this case to the Commission because it was not satisfied that the Commission had given "reasoned consideration" to the evidence of meritorious programming that was in the record. The court's opinion made clear that it desired the Commission to consider explicitly the evidence already in the record, which the court identified (see Pet. App. 31a-35a); it did not suggest that the Commission should reopen the record. And in affirming the Commission's final decision, the court of appeals found that the Commission had "faithfully complied with our instructions on remand" (*id.* at 3a).[5]

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[4]In view of the fact that "virtually all of WHBI's foreign language and ethnic programming is produced and presented by time brokers" (81-601 Pet. 3-4), these programs could be made available to other licensees in the service area even if Cosmopolitan's renewal were denied. See Pet. App. 156a.

[5]Petitioners Bulgarian American League, et al., also contend (81-603 Pet. 6-10) that the Commission violated the Communications Act of 1934 when it dismissed their petition for reconsideration. The Act, however, specifies that petitions for reconsideration "shall be governed by such general rules as the Commission may establish * * *." 47 U.S.C. 405. Petitioners' petition for reconsideration properly was dismissed for failure to comply with Commission rules governing the filing of such petitions by non-parties, since petitioners never sought to intervene

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1981

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before the agency (Pet. App. 165a n.17). See 47 C.F.R. 1.106(b)(1). Because the petition failed to satisfy these rules, which have been judicially approved (*Valley Telecasting Co.* v. *FCC*, 336 F. 2d 914, 916-917 (D.C. Cir. 1964)), its dismissal was fully in accord with the Communications Act.

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